

INVESTMENTS OVERSIGHT COMMITTEE

2009 INTERIM

FINAL REPORT

**New Mexico Legislative Council Service
Santa Fe, New Mexico
March 2010**

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COMMITTEE MEMBERSHIP, WORK PLAN AND MEETING SCHEDULE

2009 APPROVED WORK PLAN AND MEETING SCHEDULE
for the
INVESTMENTS OVERSIGHT COMMITTEE

Members

Rep. John A. Heaton, Chair
Sen. John Arthur Smith, Vice Chair
Rep. Donald E. Bratton
Sen. Tim Eichenberg
Sen. Timothy M. Keller
Rep. Larry A. Larrañaga

Sen. Carroll H. Leavell
Sen. Steven P. Neville
Rep. Henry Kiki Saavedra
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Luciano "Lucky" Varela

Advisory Members

Rep. Andrew J. Barreras
Sen. Carlos R. Cisneros
Rep. Miguel P. Garcia
Rep. Roberto "Bobby" J. Gonzales
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. Mary Kay Papen
Sen. William H. Payne

Rep. Jane E. Powdrell-Culbert
Sen. John C. Ryan
Sen. Michael S. Sanchez
Rep. Sheryl Williams Stapleton
Rep. Shirley A. Tyler
Rep. Richard D. Vigil
Sen. Peter Wirth

Work Plan

During the 2009 interim, the committee will focus on the following activities.

1. Examine the performance of the investment portfolios of the State Investment Council (SIC), the Public Employees Retirement Association (PERA), the Educational Retirement Board (ERB), funds in the state treasury, state college saver and deferred compensation funds (the "investment funds") in absolute terms and compared to policy benchmarks and comparable funds. This would include the returns on the entire portfolio as well as the return on individual segments, including stocks, bonds, real estate and private equity.

2. Review the manner in which investment policy and associated earning benchmarks were set for the investment funds by the governing bodies and investigate how each agency determines the proportional mix of types of investments, including mutual stock and bond funds, individual stocks and bonds, real estate, private equity, etc. The IOC also proposes to seek an understanding of how investment policies for the retirement funds change in response to changes in projections regarding program solvency and unfunded liabilities.

3. Given the severe downturn in the retirement fund balances and in preparation for the review to be submitted to the committee by the Retirement Systems Solvency Task Force as well as the independent operational and fiduciary review to be contracted for by the Legislative Council Service and the State Board of Finance, the IOC will gather background information on the constitutional and statutory provisions governing defined benefit and defined contribution retirement plans.

4. Receive reports from the independent operational and fiduciary review contractor on "best practices" among comparable state investment funds in the areas of investment fund governance, process and policies, in the areas of board composition and independence, staff expertise, overall investment policy setting, the selection of individual investments, selection and compensation of advisors, portfolio valuation and rebalancing, etc.

5. The IOC will investigate the apparent failure of investment advisors to anticipate and/or provide adequate safeguards against the recent economic and financial collapse and whether unwarranted payments were made to third-party investment marketers or placement agents.

6. Receive ongoing status reports on progress of the Retirement Systems Solvency Task Force created by House Bill 573 and propose IOC-sponsored legislative reforms based on the task force's deliberations and reports to the committee.

APPROVED MEETING SCHEDULE

<u>Date</u>	<u>Location</u>
June 8, 2009	Santa Fe
July 6 & 7, 2009	Santa Fe
August 26, 2009	Santa Fe
October 9, 2009	Santa Fe
November 30, 2009	Santa Fe

REPORT OF THE INVESTMENTS OVERSIGHT COMMITTEE: SUMMARY

REPORT OF THE INVESTMENTS OVERSIGHT COMMITTEE: SUMMARY

Introduction

The Investments Oversight Committee was created by the New Mexico Legislative Council as the successor to the Investments and Pensions Oversight Committee. The Investments Oversight Committee focused during this interim on the investment functions of the State Investment Council (SIC), the Public Employees Retirement Association (PERA) Board and the Educational Retirement Board (ERB). The oversight of pension fund solvency was vested by the New Mexico Legislative Council in the Retirement Systems Solvency Task Force.

The oversight by the legislature of investments and pensions began in 2003, with the creation of the State Permanent Fund Task Force by Senate Joint Memorial 14, and continued pursuant to Senate Joint Memorial 13 of the 2005 session. House Bill 212 of the 2006 session would have created a committee much like the Investments and Pensions Oversight Committee; however, the bill was pocket-vetoed by Governor Richardson. Since 2006, the New Mexico Legislative Council has created the Investments and Pensions Oversight Committee and its successors.

Summary of Committee Activity

The Investments Oversight Committee meetings during the 2009 interim addressed a number of issues related to the funds invested by the SIC, the PERA and the ERB. The committee not only examined the investment performance of each fund but also considered fund governance, policymaking and procurement processes for investment managers and consultants.

The committee took testimony from nationally recognized experts on common and best practices among comparable funds in matters related to investment fund governance and management, including governing board composition and expertise, fiduciary duties and ethical considerations. The committee also heard common and best practices related to investment policies and procedures, including investment goals, asset allocation, alternative investments, internal versus external management, role of placement agents and the selection and compensation of investment consultants.

The committee also requested and received written and oral testimony from the SIC, the PERA and the ERB on their own governance structures, policies and processes. This

educational effort was undertaken in part so that the committee could most constructively fulfill its duties regarding the review of findings of the fiduciary review of the SIC, the PERA and the ERB commissioned by the New Mexico Legislative Council and any recommendations coming from the Retirement Systems Solvency Task Force.

Nationally recognized experts also testified before the committee on the best practices regarding asset allocation, the measurement and monitoring of investment performance, the evaluation of investment managers and the role of third-party sales agents.

The committee received updates on the recent investment performance of the SIC, PERA and ERB funds. These presentations included details on each fund's overall performance relative to benchmarks and peers, asset allocations, risk tolerances and asset reallocation strategies undertaken to deal with the severe financial downturn.

The New Mexico Attorney General's Office and the Securities Division of the Regulation and Licensing Department testified before the committee regarding their respective roles in the investigation and prosecution of cases related to state investments and potential alternatives for additional legislation.

The committee developed legislative recommendations, listed below, which were a consensus-based combination of a number of pieces of legislation that were brought forward and endorsed by the committee at its final meeting. Recommendations included:

- a proposal to expand investment fund governing boards that combines a bill that passed last session but was vetoed, and regarded the makeup of the SIC, and other proposals from past bond sessions on the makeup of the ERB and PERA boards;
- a proposal to establish additional advisory committees to the SIC and the ERB and PERA boards for alternative investments that would increase the power of each board to hire and fire investment managers and consultants;
- a proposal to grant the New Mexico attorney general additional authority to investigate and prosecute investment fraud cases; and
- a proposal to grant a retired PERA member with a designated survivor pension beneficiary other than the retired member's spouse or former spouse a one-time option to change beneficiaries.

AGENDAS AND MINUTES OF MEETINGS

Revised: June 4, 2009

**TENTATIVE AGENDA
for the
FIRST MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**June 8, 2009
Room 322, State Capitol
Santa Fe**

Monday, June 8

- 10:00 a.m. **Call to Order**
—Representative John A. Heaton, Chair
—Senator John Arthur Smith, Vice Chair
- 10:05 a.m. **Interim Legislative Meeting Protocols**
—Paula Tackett, Director, Legislative Council Service (LCS)
- 10:30 a.m. **Review of State Investment-Related Legislation, 2009 Session, Including
Status Report on the Implementation of the Retirement Systems Solvency
Task Force**
—Doris Faust, Staff Attorney, LCS
—Wayne Propst, Executive Director, Retiree Health Care Authority
- 11:00 a.m. **Update on Investment Performance and Recent Issues Involving Third-Party
Placement Agents**
—Daniel White, Economist, Legislative Finance Committee (LFC)
—Michelle Aubel, Senior Fiscal Analyst, LFC
- 12:00 noon **Lunch**
- 1:30 p.m. **Investment Performance Update: Public Employees Retirement Association
(PERA)**
—Terry Slattery, Executive Director, PERA
—Robert Gish, Investment Director, PERA
- 2:15 p.m. **Investment Performance Update: State Treasurer**
—James B. Lewis, State Treasurer
—Scott Newman, Interim Chief Investment Officer

- 3:00 p.m. **Investment Performance Update: State Investment Council (SIC)**
—Gary B. Bland, State Investment Officer, SIC
—Adam Levine, Senior Deputy, SIC
—Charles Wollmann, Public Information Officer, SIC
- 3:45 p.m. **Investment Performance Update: Educational Retirement Board (ERB)**
—Jan Goodwin, Executive Director, ERB
—Bob Jacksha, Chief Investment Officer, ERB
- 4:30 p.m. **Adoption of Interim Work Plan**
—Tom Pollard, Legislative Fiscal Analyst, LCS
- 5:00 p.m. **Adjourn**

**TENTATIVE AGENDA
for the
JULY MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**July 6 & 7, 2009
Room 307, State Capitol
Santa Fe**

Monday, July 6

- 10:00 a.m. **Call to Order**
—Representative John A. Heaton, Chair
—Senator John Arthur Smith, Vice Chair
- 10:05 a.m. **Public Employees Retirement Association (PERA) Deferred Compensation Plans: Update on Investment Performance and Recent Program Activities**
—Kurt Weber, Deputy Director of Operations, PERA
—JoAnn Garcia, Deferred Compensation Manager, PERA
—Lou Moreno, Regional Vice President, Nationwide Retirement Solutions
- 12:00 noon **Lunch**
- 1:30 p.m. **Educational Retirement Board (ERB): Educational Retirement Fund Governance, Policies and Processes**
—Jan Goodwin, Executive Director, ERB
—Bob Jacksha, Chief Investment Officer, ERB
- 4:30 p.m. **Discussion of Requests for Information from the State Investment Council and ERB**
—Sebastian Dunlap, Legislative Council Service (LCS)
—Tom K. Pollard, Ph.D., LCS
- 5:00 p.m. **Recess**

Tuesday, July 7

- 9:00 a.m. **Call to Order**
—Representative John A. Heaton, Chair
—Senator John Arthur Smith, Vice Chair
- 9:05 a.m. **Overview of Public Investment Fund Governance: Common and Best Practices Among the States**
—Steven M. Harding, Managing Director, Independent Fiduciary Services
—Phyllis D. Taylor, Independent Fiduciary Services

12:00 noon **Lunch**

1:30 p.m. **Overview of Public Fund Investment Performance Measurement and
Monitoring: Common and Best Practices Among the States**
—Allan Martin, Managing Partner, New England Pension Consultants (NEPC)

5:00 p.m. **Adjourn**

Revised: August 18, 2009

**TENTATIVE AGENDA
for the
AUGUST MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**August 26, 2009
Room 307, State Capitol
Santa Fe**

Wednesday, August 26

- 9:00 a.m. **Call to Order**
 —Representative John A. Heaton, Chair
 —Senator John Arthur Smith, Vice Chair
- 9:15 a.m. **Public Employees Retirement Association (PERA): Update on Investment Performance Through Second Quarter of 2009 and Overview of Governance Structure, Policies and Processes Under Which PERA Operates**
 —Terry Slattery, Executive Director, PERA
 —Bob Gish, Investment Director, PERA
- 11:15 a.m. **Educational Retirement Board (ERB): Update on Investment Performance Through Second Quarter of 2009**
 —Bob Jacksha, Chief Investment Officer, ERB
- 12:00 noon **Lunch**
- 1:30 p.m. **State Investment Council (SIC): Update on Investment Performance Through Second Quarter of 2009 and Overview of Governance Structure, Policies and Processes Under Which SIC Operates**
 —Gary Bland, State Investment Officer
 —Adam Levine, Senior Deputy State Investment Officer
- 4:00 p.m. **Committee Business**
 —Doris Faust, Staff Attorney, Legislative Council Service
 1. Progress Report on Background Legal Research on Defined Benefit and Defined Contribution Retirement Plans
 2. Report on Martin Act of New York State
 3. Letters to ERB and SIC regarding ongoing investigations
- 5:00 p.m. **Adjourn**

Revised: October 5, 2009

**TENTATIVE AGENDA
for the
OCTOBER MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**October 9, 2009
Room 307, State Capitol
Santa Fe**

Friday, October 9

- 9:00 a.m. **Call to Order**
—Representative John A. Heaton, Chair
—Senator John Arthur Smith, Vice Chair
- 9:15 a.m. **New Mexico Educational Retirement Board (ERB) — Recent Investment Performance and Potential Impact of 2010 General Fund Solvency Proposals on the ERB**
—Jan Goodwin, Executive Director, ERB
—Bob Jacksha, Chief Investment Officer, ERB
- 10:00 a.m. **New Mexico Retiree Health Care Authority (RHCA) — Recent Investment Performance and Potential Impact of 2010 General Fund Solvency Proposals on the RHCA**
—Wayne Propst, Executive Director, RHCA
- 10:45 a.m. **Committee Business**
- 11:00 a.m. **Update on Retirement Fund Investment Performance and Basic Determinants of Retirement Fund Sustainability**
—Dan White, Legislative Finance Committee (LFC)
—Michelle Aubel, LFC
- 12:00 noon **Lunch**
- 1:30 p.m. **Public Employees Retirement Association (PERA):**

Two Part Presentation:
(1) Projected Long-Term Investment Returns and Implications for Retirement Fund Solvency

(2) Benefits to the Retirement Fund of Active Versus Passive Investment Management and Management Fee Policy

- Terry Slattery, Executive Director, PERA
- Robert Gish, Director of Investments, PERA
- Jim Voytko, Co-President, R.V. Kuhns & Associates

4:30 p.m. **Adjourn**

**TENTATIVE AGENDA
for the
NOVEMBER MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

November 30, 2009
Room 307, State Capitol
Santa Fe

Monday, November 30

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| 9:00 a.m. | Call to Order
—Representative John A. Heaton, Chair
—Senator John Arthur Smith, Vice Chair |
| 9:05 a.m. | Update on Recent Investment Performance of the State Investment Council (SIC), Public Employees Retirement Association (PERA) and Educational Retirement Board (ERB)
—Jan Goodwin, Executive Director, ERB
—Bob Jacksha, Interim State Investment Officer, SIC
—Terry Slattery, Executive Director, PERA
—Dan White, Financial Economist, Legislative Finance Committee |
| 10:30 a.m. | Overview of Current Statutes Governing the New Mexico Attorney General's Role in Investigation or Prosecution of Cases Related to State Investments and Discussion of Potential Alternatives for Additional Legislation
—Al Lama, Chief Deputy New Mexico Attorney General |
| 11:45 a.m. | Committee Business |
| 12:00 noon | Lunch |
| 1:30 p.m. | Update on Status of the Independent Fiduciary and Operational Review of SIC, PERA and ERB Investment Programs and the Deliberations of the Retirement Systems Solvency Task Force
—Raúl Burciaga, Legislative Council Service |
| 2:15 p.m. | Proposed Legislation
—TBA |
| 4:00 p.m. | Adjourn |

**MINUTES
of the
FIRST MEETING IN 2009
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**June 8, 2009
Room 322, State Capitol
Santa Fe**

The first meeting of the Investments Oversight Committee (IOC) for 2009 was called to order by Representative John A. Heaton, chair, at 10:10 a.m. on Monday, June 8, 2009, in Room 322 of the State Capitol in Santa Fe.

Present

Rep. John A. Heaton, Chair
Rep. Donald E. Bratton
Sen. Tim Eichenberg
Sen. Timothy M. Keller
Rep. Larry A. Larrañaga
Sen. Carroll H. Leavell
Sen. Steven P. Neville
Rep. Henry Kiki Saavedra
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Luciano "Lucky" Varela

Absent

Sen. John Arthur Smith, Vice Chair

Advisory Members

Rep. Andrew J. Barreras
Sen. Carlos R. Cisneros
Rep. Miguel P. Garcia
Rep. Roberto "Bobby" J. Gonzales
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. Mary Kay Papen
Rep. Jane E. Powdrell-Culbert
Sen. John C. Ryan
Rep. Sheryl Williams Stapleton
Rep. Shirley A. Tyler
Rep. Richard D. Vigil

Sen. William H. Payne
Sen. Michael S. Sanchez
Sen. Peter Wirth

Staff

Tom Pollard, Legislative Council Service (LCS)
Doris Faust, LCS

Guests

The guest list is in the original meeting file.

Handouts

Handouts from the meeting are in the original meeting file.

Monday, June 8**Interim Legislative Committee Protocols**

John Yaeger, assistant director, LCS, advised the committee of the interim committee protocols, including those relating to the establishment of a quorum. He said that a quorum consists of 50 percent plus one of the voting members assigned to the committee. Once a quorum is established, it is presumed to exist until the question of whether a quorum exists is raised by a voting member or a roll call vote is taken. He said the New Mexico Legislative Council authorizes the speaker of the house and the president pro tempore to adjust the membership of the committees. Members may resign at any time. Mr. Yaeger addressed issues related to the sound system in the committee rooms, saying that the sound system adjusts automatically and is easily disrupted by background noise. If a committee member is having trouble hearing, he suggested checking for excessive background noise (e.g., side conversations, paper rustling, typing, etc.). Mr. Yaeger discussed the interim committee calendar and said that meeting conflicts were avoided as best as possible during the calendar creation. He added that any changes to the calendar must be approved by the legislative council. Finally, Mr. Yaeger addressed per diem and mileage forms and conference attendance, and he noted that complaints have arisen over the use of cell phones during committee meetings and that it is up to the committee chairs to address those concerns. Mr. Yaeger discussed the blocking provision, which states that no action shall be taken if a majority of the members from one house vote against a measure.

Review of State Investment-Related Legislation from the 2009 Session, Including a Status Report on the Implementation of the Retirement Systems Solvency Task Force

Ms. Faust, a staff attorney for the LCS, provided a brief report on the key bills relating to investments from the 2009 legislative session. Ms. Faust noted that the committee had not endorsed any bills for the last session and that there were only three bills relating to committee work that were signed into law and one that passed both houses but was vetoed.

Two separate handouts of summaries of bills were provided to the committee. A report on bills related to pensions and solvency was distributed for informational purposes but was not discussed.

The legislative council complied with the mandate set in House Bill 573 by appointing members to the Retirement Systems Solvency Task Force (RSSTF), including the chair and vice

chair of the IOC. The task force will be studying pension fund solvency and will be reporting to the IOC. Rather than duplicate the work of the task force on pension solvency, the IOC intends to focus on investment issues.

Ms. Faust reported that House Bill 454, which enacts in New Mexico the Uniform Prudent Management of Institutional Funds Act, repeals existing law dealing with the same topic. The new act was adopted by the National Conference of Commissioners on State Laws in 2006 and has been adopted in 29 other states.

House Bill 454 may be applicable to some state investments, based on the definitions in the bill. The term "charitable purpose" is defined to include the promotion of a governmental purpose, and the term "institution" is defined to include a governmental instrumentality. So arguably, all state investments would need to comply with this act. Only two state funds are excluded from being covered: the Severance Tax Permanent Fund and the Permanent School Fund. The new law provides more guidance to fund managers.

House Bill 876 prohibits the state investment officer, the State Investment Council (SIC), the retirement board of the Public Employees Retirement Association (PERA) and the Educational Retirement Board (ERB) from making any investment, other than investments in publicly traded securities, unless the recipient of the investment discloses the identity of any third-party marketer who assists the recipient in obtaining the investment. The amount of the fee, commission or retainer paid to the marketer must also be disclosed. A violation of the act, which requires a knowing withholding of information, constitutes a fourth degree felony and can result in a fine of up to \$20,000.

Senate Bill 406 was vetoed by the governor. This bill would have changed the makeup of the SIC, providing for more input from the legislature and less from the governor.

House Judiciary Committee Substitute for House Education Committee Substitute for House Bill 573 created the RSSTF. The details of this bill were addressed by Wayne Propst, executive director, Retiree Health Care Authority (RHCA).

Mr. Propst introduced the RHCA board members who were present and thanked the legislature for passing House Bill 573 and House Bill 351. He reviewed the market values and changes in net asset value posted by the fund, noting that the last six months have been a roller coaster. The market value of the fund, effective April 30, 2009, was \$136,752,722.24, whereas in February 2009 the fund value was \$122,897,300.45.

Turning to the subject of 2009 legislation, Mr. Propst informed the committee that House Bill 351 will have an important and positive effect on the solvency of the fund by increasing employer and employee contributions. House Bill 573 also improves fund solvency. Under the new law, members must purchase service credit from the RHCA if they purchase service credit from the PERA or the ERB, and it requires return-to-work employees and their employers to contribute to the RHCA.

Despite these two bills, there is still a lot of work to do with regard to fund solvency. By 2018, fund expenses will exceed fund revenue. Mr. Propst warned of the need to be cognizant of the state's unfunded liability and to ensure that fund benefits are available to all current and future retirees.

The RHCA staff will be making comprehensive recommendations to the board at its next meeting, on July 7-8, 2009. Issues to be addressed will include premium increases, plan design changes, select plans and carriers for Medicare members and a review of other finance elements. The authority will continue to look at age and service requirements.

On questioning by the committee, Mr. Propst discussed: the difference between the terms "unfunded liability" and "solvency"; reinvestment assumptions; and whether the fund can expect an 8% return on investments.

The committee expressed concern about the fund's underperformance against its benchmarks and the plan affecting the borrowing capacity of the state, and it discussed the ability and need for the authority to change co-pay and deductible rates, even in the absence of legislation on that point.

Representative Heaton noted that health care is the second-largest problem in the United States, that it consumes 16.5% of the gross domestic product and that this needs to be addressed if the United States is to remain competitive in the world market.

Update on Investment Performance and Recent Issues Involving Third-Party Placement Agents

Daniel White, economist, Legislative Finance Committee (LFC), provided a handout regarding FY09 third-quarter investment performance highlights. Mr. White reported that all state investment agencies improved on their second-quarter performance relative to benchmarks. The SIC-managed Land Grant Permanent Funds and Severance Tax Permanent Fund were the most impressive performers, beating their overall policy benchmarks by an outstanding 620 and 650 basis points, respectively. The funds' performance was good enough to rank them both in the top 8% of U.S. endowment funds.

Both the PERA and the ERB investments underperformed quarterly policy benchmarks, marking the sixth consecutive quarter that the PERA investments have underperformed quarterly policy benchmarks. The PERA funds continue to be ranked in the bottom 3% of all U.S. public funds for one-year and five-year returns.

The ERB fund improved significantly from the previous quarter, missing its quarterly benchmark by only 40 basis points. This performance improved the fund's quarterly peer ranking from the ninety-seventh percentile to the forty-fifth percentile relative to other U.S. public funds. However, the fund's one-year and five-year returns remain substantially below their respective benchmarks.

The primary reason for the SIC-managed permanent funds' outperformance of benchmarks was the domestic equity hedging program. The strategy utilizes derivatives products to mitigate risk associated with volatile market conditions and allowed the two funds to outperform the S&P 500 by an impressive 1,140 basis points.

Michelle Aubel, senior fiscal analyst, LFC, discussed third-party marketing issues and reported on the current status of charges and investigations into third-party marketing payments in New Mexico. Ms. Aubel described the new SIC rules relating to third-party marketers, noting that the LFC will also be monitoring this issue and that diligent oversight by the LFC and the IOC is important to safeguard state funds.

Investment Performance Update: Public Employees Retirement Association

Robert Gish, investment director, PERA, and Terry Slattery, executive director, PERA, reported that they are pleased with the PERA's current numbers. The presenters reviewed detailed handouts on the PERA's investment performance, noting that the fund value was approximately \$8.7 billion as of April 30, 2009. Mr. Gish stated that the PERA has passed its low point and should remain that way if the markets hold up. As of May 2009, the fund is down 22% for the fiscal year. The PERA has experienced six quarters of underperformance, but as the credit crisis continues to resolve, the fund will perform better.

The presenters discussed allocation targets, reporting that the PERA has not changed its targets, but has changed the allocations. The PERA is slightly overallocated to U.S. equities and very overallocated to international equities.

On questioning by the committee, Mr. Gish discussed:

- alternative investments and how they are broken out in the report;
- the structure of the PERA and who helps with investment decisions;
- the PERA consultants, and who monitors all of the PERA's investments;
- how consultants, including Cliffwater, LLC, consultants, are compensated;
- the valuation of private equity investments;
- the PERA's request for proposals process;
- the PERA's performance in relation to its peers and what policy changes the PERA has made in response to being in the bottom 3% of funds;
- termination of fund managers who are underperforming;
- the PERA's option to take a defensive stance and to preserve funds by getting out of the market and the 13 triggers that would make the PERA take such a defensive policy;
- expertise on the PERA board, and whether the breakdown in the market was foreseeable; and
- accepted best practices of large funds.

Investment Performance Update: State Treasurer

James B. Lewis, state treasurer, and Scott Newman, interim chief investment officer, provided an overview of the state treasury, including the history of the State Treasurer's Office, the treasurer's duties, the organizational structure of the State Treasurer's Office and the

treasurer's oversight functions. The State Treasurer's Office manages the day-to-day operating money of the state and does not contract with an outside investment advisor.

Mr. Lewis reported on the general fund investment portfolio, which had a market value of \$1.63 billion as of May 31, 2009. This compares to a \$2.3 billion value at the same point last year and a \$2.54 billion value at the same point two years ago. The market value of the portfolio decreased by \$9 million from April 30, 2009 to May 30, 2009.

The general fund outperformed its benchmark with an earned yield of 2.12%. However, May earnings were \$2.53 million, representing a 49.98% decrease from April earnings. Fiscal year earnings totaled \$72.42 million.

As of May 31, 2009, the local government investment pool portfolio market value was \$964 million, compared to a market value of \$1.7 billion at the same time last year and \$972 million two years ago.

As of May 31, 2009, the tax exempt bond proceeds investment pool portfolio market value was \$738.5 million, compared to a market value of \$524.9 million at the same time last year and \$547.6 million two years ago.

As of May 31, 2009, the taxable bond proceeds investment pool portfolio market value was \$791.4 million, compared to a market value of \$648.2 million at the same time last year and \$687.7 million two years ago.

Investment Performance Update: State Investment Council

Adam Levine, senior deputy, SIC, and Charles Wollmann, public information officer, SIC, presented the committee with a handout detailing the status of SIC funds, noting that there is a lot of red ink on the fund summary page. Domestic equity benchmarks and international equity benchmarks are generally down, domestic fixed income benchmarks are up and alternative benchmarks are mixed.

Over the past 12 months, the combined funds experienced a net investment loss of \$3.6 billion, which includes a net investment loss of \$124.5 million in the first quarter. Contributions totaled \$574.2 million for the year, while distributions totaled \$746.8 million. For the quarter, total assets increased from \$11.4 billion at the beginning of the quarter to \$11.8 billion at the quarter's end, with \$72.5 million in net distributions.

Over the past five years, the Land Grant Permanent Funds returned 0.7% per annum, outperforming its policy index by 1.8% and ranking in the thirty-fourth percentile of the independent consultant cooperative's endowments and foundations universe. Over the same period, the Severance Tax Permanent Fund returned 0.0% per annum, trailing its policy index by 0.6% and ranking in the forty-sixth percentile.

For the one-year period ending March 31, 2009, the Land Grant Permanent Funds returned -23.8%, outperforming its policy index by 4.4% and ranking in the thirty-fifth

percentile of endowment and foundations funds, while the Severance Tax Permanent Fund returned -25.7%, outperforming its policy by 2.2%, ranking in the fifty-second percentile.

For the quarter, the Land Grant Permanent Funds returned -1.0%, outperforming its policy index by 6.2% and ranking in the seventh percentile of endowment and foundations funds, while the Severance Tax Permanent Fund returned -1.1%, outperforming its policy by 6.5% and ranking in the eighth percentile.

Mr. Levine next discussed the SIC's new transparency and disclosure policy and provided committee members with copies of the policy. After reviewing many other disclosure policies, the SIC has concluded that this new policy is the most expansive and comprehensive it has found.

Investment Performance Update: Educational Retirement Board

Jan Goodwin, executive director, ERB, and Bob Jacksha, chief investment officer, ERB, reviewed their handouts detailing the performance of the ERB fund and also welcomed input from the committee on the format of the ERB handouts.

The presenters reported that all but three of the ERB fund managers have turned their underperformance around in the last three months. Fund balances were \$6.2 billion at the end of March 2009, \$6.6 billion at the end of April and \$7.0 billion at the end of May.

The ERB's next actuarial study will begin on June 30, 2009, with a report anticipated in November.

The committee raised the issue of subpoenas served on the ERB. Ms. Goodwin stated that the ERB was comfortable with its responses to those subpoenas, which was to deny the request. Senator Ryan noted that the committee may require a further discussion of this issue in the future and that the committee might want to have the subpoenaed information disclosed to the committee. Ms. Goodwin expressed a concern with interfering with an ongoing federal investigation and noted that disclosing such information might hamper the ERB's future efforts to obtain full disclosure from consultants regarding third-party marketing fees paid by those consultants.

The committee discussed third-party marketer fees and how to improve policies to control payments to third-party marketers, concluding that there is a lot of room for improvement in these policies.

Adoption of Interim Work Plan

Mr. Pollard, a legislative fiscal analyst for the LCS, reviewed the details of the proposed interim work plan, which was adopted by the committee without objection.

There being no further business, the committee adjourned at 5:25 p.m.

**MINUTES
of the
SECOND MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**July 6-7, 2009
Room 307, State Capitol
Santa Fe, NM**

The second meeting of the Investments Oversight Committee (IOC) for the 2009 interim was called to order by Representative John A. Heaton, chair, at 10:14 a.m. on July 6, 2009 in Room 307 of the State Capitol in Santa Fe.

Present

Rep. John A. Heaton, Chair
Rep. Donald E. Bratton
Sen. Tim Eichenberg
Sen. Timothy M. Keller
Rep. Henry Kiki Saavedra
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Luciano "Lucky" Varela

Absent

Sen. John Arthur Smith, Vice Chair
Rep. Larry A. Larrañaga
Sen. Carroll H. Leavell
Sen. Steven P. Neville

Advisory Members

Rep. Andrew J. Barreras
Sen. Carlos R. Cisneros
Rep. Miguel P. Garcia
Rep. Roberto "Bobby" J. Gonzales
Rep. Jane E. Powdrell-Culbert
Rep. Sheryl Williams Stapleton
Rep. Shirley A. Tyler
Rep. Richard D. Vigil

Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. Mary Kay Papen
Sen. William H. Payne
Sen. John C. Ryan
Sen. Michael S. Sanchez
Sen. Peter Wirth

Staff

Tom Pollard, Legislative Council Service (LCS)
Doris Faust, LCS
Sebastian Dunlap, LCS
Michael Calderon, LCS

Guests

The guest list is in the original meeting file.

Handouts

Handouts from the meeting are in the original meeting file.

Monday, July 6

Public Employees Retirement Association (PERA) Deferred Compensation Plans: Update on Investment Performance and Recent Program Activities — Joanne Garcia, Deferred Compensation Program Manager, PERA; Kurt Weber, Deputy Executive Director for Operations, PERA; Lou Moreno, Regional Vice President, Nationwide Retirement Solutions.

Mr. Moreno presented a brief history of New Mexico's deferred compensation plan. The plan was started in the early 1970s and was primarily offered and administered by insurance companies using insurance-based products. In 1997, the PERA "unbundled" the insurance annuity products and converted to more flexible, less costly direct mutual investment products. An independent investment advisor was hired to assist the PERA in selecting and monitoring plan investment options. Plan administrators were switched from commission-based compensation to salary-based compensation. In 2004, the plan was expanded to include a loan option. In 2005, a self-directed brokerage account option was implemented and life-cycle portfolios were implemented.

Mr. Moreno stated that as of March 31, 2009, plan assets totaled \$269 million. Quarterly contributions average \$9 million and quarterly distributions average \$862,000. There are 15,604 plan participants, a 7% increase since March 31, 2008. Quarterly fees for plan participants include the third-party administrator fee of \$14.75/quarter, the investment consultant fee of \$1.26/quarter and the PERA administrative fee of \$1.22/quarter.

Mr. Moreno explained that there are currently six life-cycle portfolios — the most recent enrolled 927 new plans in the last three quarters. The self-directed brokerage account option opened the trading menu to include all available investments except alternative investments in January 2009. As for the loan program, interest is charged at the prime rate plus 1%. Up to five years are allowed to repay a general purpose loan and 15 years are allowed for purchase of a primary residence. Tax-deferred transfers can be used to purchase service credit in the defined benefit plans administered by the PERA and/or the Educational Retirement Board (ERB). Rollovers are allowed from other plans, including 457(b), 401(k) (private sector plan where employer matching is involved), 403(b) and 401(a) (employer contribution, or IRA).

In response to a question by committee members regarding how employees are "educated" on benefits and plans, Mr. Moreno responded that group presentations and one-on-one consultations are conducted on a regular basis. Education strategies for both urban and rural participants have been expanded through four regional offices. A state-specific web site provides information and participant account information — www.newmexico457dc.com — for the benefit of the plan participants.

Members of the committee asked questions regarding the qualifications of plan representatives. Mr. Moreno stated that all plan representatives making presentations are fully

certified and accredited and are salaried employees of Nationwide Retirement Solutions. He stated also that plan participants are made aware of alternatives to the tax-deferred accounts, e.g., Roth IRAs, that there is no "fixed return" option offered to plan participants and that the active management options carry no additional fees beyond the quarterly fees discussed.

Mr. Weber discussed emphasizing to participants the need for well-diversified asset allocation. Mr. Moreno informed the committee that 38% of new participants are choosing the life-cycle portfolio option managed by the investment consultant.

The ERB: Educational Retirement Fund Governance, Policies and Processes — Jan Goodwin, Executive Director, ERB, and Bob Jacksha, Chief Investment Officer, ERB.

Ms. Goodwin discussed board of directors membership and the investment committee, audit committee and disability review committee established by the board. She discussed the role and responsibilities of the board of directors, which are in Sections 22-11-6, 22-11-7 and 22-11-13 NMSA 1978.

Ms. Goodwin discussed the role and responsibilities of the chief investment officer for the ERB, Mr. Jacksha, who is generally responsible for managing and monitoring the ERB's investment portfolio. She presented a summary of the investment roles of the board, the general investment advisor, specialty advisors for alternative investments and the custodial bank and described the process that is used by the board and staff to select consultants and advisors. She also referred the committee to a more detailed account to be found in the February 2006 publication titled: NM ERB - Investment Goals, Objectives and Policies. She explained that a draft of an update to the publication was submitted to the ERB in June 2009.

Mr. Jacksha reported on the investment returns from the most recent asset allocation adopted by the ERB in 2007. Estimates at that time of what returns would be over the last two years have not been met, and a new asset allocation study is underway.

In response to questions by the committee regarding the source of the projections of investment earnings, Mr. Jacksha stated that they are provided by the general investment advisor, NEPC, based on what various investment alternatives have done in the past and taking into account the current economic environment and the outlook for the future.

Senator Sapien suggested to the representatives of the ERB that they might examine alternative asset allocation models used by other investment funds.

Committee members had questions regarding whether the hiring of firms providing investment advice to the ERB was conducted by outside firms. Mr. Jacksha responded by stating that third-party firms do not hire any of the ERB's investment advisors. Mr. Jacksha estimated that the ERB currently employs approximately 40 investment managers.

In response to a question from the committee regarding whether there has been consideration of reducing the number of managers at the ERB, Mr. Jacksha stated that it was the

role of the general consultant to present information on the optimum number of asset classes and managers.

Discussions of Requests for Information from the State Investment Council and the ERB
— Mr. Dunlap and Mr. Pollard.

Mr. Dunlap stated that the IOC has no subpoena power. The authority to subpoena is an investigative power extended by the legislature. This power can be extended by a single house resolution, a joint resolution or by statute. For example, the legislature has given subpoena power by statute to the Legislative Finance Committee but not to the New Mexico Legislative Council or the committees it creates.

Mr. Dunlap stated that although the IOC lacks subpoena power, it can request information under the federal Freedom of Information Act. These requests, however, may be prohibited by policy or denied based on the assertion that the release of requested information would interfere with law enforcement proceedings.

In response to a question by Representative Heaton, Mr. Dunlap stated that the LCS's request for the contents of the subpoena had been denied and that there was no information to indicate that the information requested by the subpoena had been delivered to those persons seeking it.

The committee requested that Paula Tackett, director, LCS, be asked to attend tomorrow's meeting to provide an update on the status of the review of the ERB and other New Mexico investment funds being commissioned by the Legislative Council and the State Board of Finance.

The committee recessed at 4:11 p.m.

Tuesday, July 7

Representative Heaton called the second day of the meeting to order at 9:15 a.m. on Tuesday, July 7, 2009.

Overview of Public Investment Fund Governance: Common and Best Practices Among the States — Steven Harding, Managing Director and Senior Vice President, and Phyllis Taylor, Vice President, Independent Fiduciary Services, Inc.

Mr. Harding began his presentation by saying that he and Ms Taylor were present before the committee to provide information, not a consultation on specific steps that the State of New Mexico could or should take. Any implementation of areas discussed would have to occur based on the facts of each case — not a blanket or universal application to all funds. He stated that none of the New Mexico funds had been reviewed by him prior to this meeting — thus, his would be a general discussion.

Mr. Harding described his firm and stated that its three primary business areas are: operational reviews of investment funds' program and practices; general retainer consulting regarding investment decision-making (e.g., asset allocation, manager selection, performance evaluation, etc.); and acting as a fiduciary decision-maker for institutional investors, replacing regular decision-makers who have a potential conflict of interest. He stated further that his presentation would focus on the practices of state and local government plans, which are created by state statute and thus vary widely from state to state and are not covered by the federal Employee Retirement Income Security Act of 1974.

Mr. Harding stated that "best practices" are best viewed in a holistic manner that includes a number of aspects: compliance with legal and regulatory requirements; internal control assessment and reporting; enterprise risk management; reporting and monitoring practices; transparency and accountability; and strong governance framework. He indicated that one of the most important best practices is that trustees, fund staff, external managers and investment consultants act as fiduciaries. The duties of the fiduciary are to act solely in the interest of the fund, act as a prudent or expert person, diversify assets, maximize returns, minimize risk and act in accordance with law and plan documents.

Mr. Harding stated that a well-designed governance structure is a prerequisite to the success of funds and their boards. He described common approaches to governance, including the respective roles of the governing board, staff and consultants. He suggested that a good governance structure includes a written governance policy with sufficient monitoring, accountability and transparency and clear delineation of the respective roles and responsibilities of key participants: boards of trustees, investment staff and service providers and what was delegable and non-delegable by boards. Delegable functions include investment management, custody securities trading, some hiring/firing and some performance evaluation. Among non-delegable functions are the establishment of an investment policy; setting investment guidelines and benchmarks; evaluating the performance of delegates; establishing governance and self-evaluation. He also discussed various aspects of risk management within fund governance, including the role of the board, audit committee, internal auditor and external auditor.

In response to a question by committee members regarding the use of actuarial soundness as a factor in setting investment policy, Mr. Harding stated that a board of directors has the fiduciary responsibility to set policy based on the maintenance of actuarial soundness and not solely the protection of benefits, even if the board's duty is to represent current or future beneficiaries of the fund.

The committee asked questions regarding best practices to establish necessary checks and balances and relative responsibilities of the governor, board members, legal counsel, staff and managers as a fund moves from traditional stocks and bonds into the private equity arena. Mr. Harding answered that this is a developing area, with no adopted best practices by the National Association of Pension Administrators, but that it is a very important area due to the necessity of establishing an effective working relationship between the fund and the private equity partnership, much more so than in the case of traditional fund investing.

In response to a question from the committee regarding whether actuarial soundness is always a moving target, Mr. Harding answered that the actuary is a key service provider to the pension fund, with an analysis of actuarial soundness done every year. Further, it is a best practice to have another actuarial firm come in and evaluate the work of the primary actuary every five years.

Committee members asked questions regarding the role of custodial banks. Mr. Harding answered that custodial banks may or may not have a fiduciary role based on whether they take an active or passive role in the investing function. A best practice is to have the custodial bank sign on to be a fiduciary.

Committee members asked questions regarding the optimum number of board members for a pension or investment fund. Mr. Harding answered that, according to a recent survey by the New York state pension fund, the average board size was nine members, but more important than the number is the expertise of board members. Many training programs are available for board members, but one has to be very careful that the content is sufficient. Mr. Harding added that it is important to build a competent staff to support the board rather than relying too heavily on outside consultants.

The presenters were asked their view of the assumption of 8% as a long-term investment return. Mr. Harding stated that the expected rate of return varies greatly by fund and is highly uncertain, but that assumptions between 7% and 8% are still reasonable. Pension plans are funds with a very long time. There is a danger of making problems worse by overreacting, even in downturns of the magnitude being faced, because selling in a low period might create a catastrophe in itself.

As requested, Raul Burciaga, LCS, appeared on behalf of Ms. Tackett to give the committee a brief update on the upcoming operational review of the investment funds that is being commissioned by the Legislative Council and the State Board of Finance. He stated that a request for proposals had been issued and the selection process was in progress, with work to commence in late September.

The question was asked whether the selection of the firm conducting the review would be based solely on price. Mr. Burciaga answered that cost is only one consideration, accounting for 15% to 20% of the selection criteria.

Questions were asked by the committee regarding the estimated cost of the review. Mr. Burciaga said that he was not at liberty to discuss price as this was a point of negotiation, but that negotiations would be finalized by the end of the month, the price would become public, work would start in late September and the report would be ready by early December.

Overview of Public Fund Investment Performance Measurement and Monitoring: Common and Best Practices Among the States — Allan Martin, Partner, NEPC.

Mr. Martin began his discussion of investment fund performance by presenting a number of alternative measurements of fund performance: performance relative to other "peer" funds, performance compared to accepted benchmarks and performance on a risk-adjusted basis.

Mr. Martin continued his presentation with an explanation of investment performance gross of fees and net of fees. Performance gross of fees represents performance after trading costs, but prior to the deduction of investment management fees. This measurement allows all investment managers to be compared on the same level. Mutual fund performance should be "grossed-up" to evaluate actual fund portfolio performance. Performance net of fees allows evaluation of investment manager returns to clients. He stated that hedge funds should only be measured net of fees.

Mr. Martin introduced the concept of time-weighted rate of return, which measures over a given time period by linking the returns for each sub-period, giving equal weight to each sub-period. This measure is independent of the amount invested in each sub-period, is most appropriate for investments in public stock and bond funds and is less appropriate for measuring private equity or partnership investments, especially over shorter time periods.

Mr. Martin followed with a discussion of dollar weighted returns, which represents the return on the average dollar invested. This measure takes into account the impact of cash outflows to the fund, including the initial investments and additional investments, and cash inflows, including profits taken during the period and the ending value of the investment. In order to measure the value of an investment before a project's termination, an estimation of value must be made, which can be very difficult for illiquid, private investments. Also, returns to private equity investments should only be measured for comparable "vintages", due to the manner in which these investments mature.

Mr. Martin then moved to a discussion of investment performance benchmarks to measure performance in absolute terms and to measure relative performance of active managers versus passive managers or performance relative to market indices or peers. He stated that performance reporting should answer the following questions: 1) On the basis of risk and return, how did a fund do relative to its peers? 2) How effective was the fund's investment policy regarding asset class weights (measured by a policy index)? 3) What was the effect of deviating from the policy weights (measured by an allocation index)? and 4) How effective were investment managers (measured by subtracting the allocation index from total returns)?

Mr. Martin discussed the development of peer group performance comparisons by developing an appropriate universe of similar portfolios with similar asset classes and management strategies. He then discussed the importance of quantifying risk and measuring it along with investment returns to make the most valid peer group comparison. He stated that volatility of returns, measured as standard deviations around an average return, is many times a

good proxy for risk. He described the Sharpe Ratio, the Sortino Ratio and the Information Ratio as examples of measurements of risk-adjusted return.

Mr. Martin continued by describing the special challenges involved in measuring the performance of "alternative" investments, including private equity and real estate, which are valued based on an appraisal of their "fair value".

He then summarized the State Investment Council, First Quarter 2009 Investment Report, as a case study in performance reporting.

The committee had questions concerning what drives or should drive the asset allocation mix. Mr. Martin answered that the decision-makers should base their asset allocation on the long-run performance of individual asset classes and a mix of classes that provide diversification, i.e., that do not move together in response to the business cycle. The decisions on absolute and relative performance of asset classes should be based on a thorough review of all available financial history, weeding out non-representative periods. He stated that rather than try to "time" the business cycle, the investor should make investment policy decisions on five- to seven-year time horizons and focus efforts on hiring the best qualified investment staff and fund managers.

The question was asked whether, given a decision to invest in the private equity market, investment funds should be limited to firms with a definite potential to go public within a reasonable period of time.

Mr. Martin answered that the investor should have a definite plan as to when private equity investments are expected to go public and should have adequate diversification among investment alternatives to lower overall risk.

The meeting adjourned at 5:00 p.m.

**MINUTES
of the
THIRD MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**August 26, 2009
State Capitol
Santa Fe**

The third meeting of the Investments Oversight Committee (IOC) for the 2009 interim was called to order by Representative John A. Heaton, chair, on Wednesday, August 26, 2009, at 10:00 a.m. at the State Capitol in Santa Fe.

Present

Rep. John A. Heaton, Chair
Sen. John Arthur Smith, Vice Chair
Rep. Donald E. Bratton
Sen. Timothy M. Keller
Rep. Larry A. Larrañaga
Sen. Carroll H. Leavell
Sen. Steven P. Neville
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Shirley A. Tyler
Rep. Luciano "Lucky" Varela

Advisory Members

Sen. Carlos R. Cisneros
Rep. Miguel P. Garcia
Sen. Mary Kay Papen
Rep. Sheryl Williams Stapleton

Absent

Sen. Tim Eichenberg
Rep. Henry Kiki Saavedra

Rep. Andrew J. Barreras
Rep. Roberto "Bobby" J. Gonzales
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. William H. Payne
Rep. Jane E. Powdrell-Culbert
Sen. John C. Ryan
Sen. Michael S. Sanchez
Rep. Richard D. Vigil
Sen. Peter Wirth

Staff

Tom Pollard, Legislative Council Service (LCS)
Doris Faust, LCS
Claudia Armijo, LCS

Guests

The guest list is located in the meeting file.

Public Employees Retirement Association (PERA) Updates on Investment Performance Through Second Quarter of 2009

Terry Slattery, PERA's executive director, and Bob Gish, chief investment officer for the PERA, presented an update on the investment performance of the PERA through the second quarter of 2009. Referring to an investment performance analysis report prepared for the PERA, Mr. Gish pointed out that the second-quarter update ended on June 30, 2009. He followed by noting that as of July 31, 2009, the fund was up 9.5%, which is down 33% from the fund high point of \$13.3 billion and higher than the fund low point in March of \$7.6 billion.

Mr. Gish walked the members through the performance report and highlighted areas of interest, particularly the breakdown of performance by management. Members inquired as to when the PERA determines it is necessary to reallocate the funds. Mr. Gish said that generally, reallocation is triggered when the fund is at 5% from the target.

Members wanted to know if the PERA was underallocated because of losses in the market. Mr. Gish answered that the PERA was partially underallocated due to the firing of a fund manager, which resulted in \$360 million being moved to cash. He noted that some of that cash has since been reallocated.

The members inquired as to the fees paid for the management of the PERA's funds. Mr. Gish said that the PERA's fees are often near the lowest paid in comparison with similar funds. He added that right now, some of the active managers are having problems, but that managers are not hired due to a month's performance nor fired due to a month's performance. Mr. Gish noted that the PERA issues a request for proposals (RFP) for all traditional managers based on their long-term records. Performance ups and downs are expected, but over time, managers typically outperform their benchmarks. Of course, if the PERA is not satisfied with a manager, the manager is terminated.

It was mentioned that satisfaction with fees paid to managers, and rate of return, is a complex issue. The PERA used to pay flat fixed-rate fees, but has started moving to performance-based fees. The PERA board has been trying to assess the benefits of management fees and continues to consider whether managers are adding value above what would be achieved through indexed funds.

Committee members asked if the PERA was doing better, worse or about the same as its "peer group" with relation to the fees paid. Board Chair Cynthia Borrego noted that as early as the past week, she had contacted others to look at the PERA peer groups because the board was not happy with the last quarter's results. She added that the board depends heavily on its staff in an effort to get better returns. She noted that she was not speaking for the board, but she did not think the PERA had been performing better than other similar-sized funds. She said the board looks at long-term returns and how they will impact the future.

Reference was made to the 8% benchmark set for the PERA, and the committee asked if that 8% was a realistic percentage when considering the PERA funds' historic performance. There was concern voiced about the ability to maintain PERA members' benefits. Mr. Gish referenced the report and said that even when including the funds' underperformance, PERA is still positive. He added that over the past 15 years, with 8% being the target, the returns have often exceeded that 8% benchmark. According to Ms. Borrego, the board took action in June and supports the 8% at this time, but it will reconsider it next year.

The committee asked about member distributions. Mr. Gish said that annual distributions to retirees are approximately \$51 million per month, whereas the fund takes in approximately \$40 million per month, amounting to a \$125 million annual deficit. He added that the pension fund is 62 years old. When it was started, contribution rates were set up to pre-fund the system. As the fund matures, the liabilities catch up with the pre-funded assets, so now the liabilities are greater than the contributions. It is anticipated that the fund will not get back to a position of having a greater amount in contributions than distributions. The actuaries determine what it takes to fund the liabilities and to maintain a fund that will last in perpetuity.

Members wanted to know if in the long term, the PERA would be looking for more contributions from members to ensure solvency. Mr. Slattery pointed out that the PERA looks out 30 to 50 years in the future when analyzing the fund and constantly reviews information. He is confident that the PERA will meet its liabilities for at least 40 to 50 years. He further noted that, based on the PERA's asset allocations, it is believed the PERA will make investment returns over time and that an increase in contribution levels is not necessary now. He stressed that the PERA is by no means insolvent, and through working with the PERA's consultants, everything necessary will be done to preserve the fund.

Representative Heaton noted that two things had emerged from the discussion. He asked the PERA staff to get back to the committee with information regarding the PERA's fee policy and the reasoning behind it. Also, he noted that in the report presented to the committee, the PERA funds are performing in the bottom quartile. Consequently, he asked that the PERA staff return to the committee and explain the PERA's policy with regard to meeting benchmarks in an understandable way, with emphasis on how the PERA funds can improve performance relative to that of its peers. Next, Representative Heaton asked the PERA staff to report back concerning the 8% growth target. He wants to know specifically if it is the right number in light of current markets. Mr. Slattery noted that the issue is currently being reviewed.

Next, the discussion moved to the topic of defined contribution plans and defined benefit plans. Mr. Slattery said that the two types of plans have been reviewed. He noted that there are issues with putting new employees into defined benefit plans because the result is an elimination of the base of employee contributions. Mr. Slattery noted that such a change would cause an unfunded liability, and the resulting deficit would have to be made up. He said that about 1,500 members retire each year, and a small number terminate their benefits.

Committee members asked if there had been an external review of the PERA by an agency other than the Legislative Finance Committee (LFC). Mr. Slattery was unsure, but noted

that, in its review, the LFC uses information supplied by PERA. It was mentioned that an external review might be appropriate.

PERA Overview of Governance Structure, Policies and Processes Under Which PERA Operates

Mr. Slattery started by explaining that, in 2001, the board adopted a mission statement and values statement intended to govern everything the board does. The presentation continued with an overview of the PERA's employment structure, the board's fiduciary responsibilities, its administration of the PERA governing statute and the adoption of policies and rules. Mr. Slattery invited committee members to visit the PERA offices.

Mr. Slattery mentioned that the PERA board receives an extraordinary amount of information, and members travel to conferences for educational purposes. Board members are encouraged to take one or two educational sessions each year. He also noted that almost half of the board members have received certification from the International Foundation of Employee Benefit Plans. He added that the board has standing committees that meet monthly, and the board complies with the Open Meetings Act.

There was further information presented regarding the statutory authority for the investment of the PERA funds, including the requirement that the board invest the funds in accordance with the Uniform Prudent Investor Act.

There were questions regarding the ability of outside influences to gain access to the PERA's investment system and how abuses in the alternative assets are prevented. Susan Pittard, general counsel for the PERA, told the committee that consultants sign a statement saying there has been no solicitation of them from a third-party marketer. She added that the consultant certifies to the PERA that no one has pressured the consultant, and that due diligence is reviewed by her and the legal staff. After further questions, Ms. Pittard explained that with regard to traditional investments, the PERA has an internal policy and issues RFPs for consultants. On the alternative investment side, the staff performs legal due diligence after an investment has been approved by the board.

Educational Retirement Board (ERB); Update on Investment Performance Through Second Quarter of 2009

Bob Jacksha, chief investment officer for the ERB, referred to the handout given to committee members, saying that it was half the size of the quarterly report and that if members wish to review a copy of the quarterly report, copies would be provided.

Mr. Jacksha discussed the ERB's investment performance noting that almost all of the major markets are negative. He added that all of the equities were in the negative, and he told the committee that the ERB's fund performance for the past 12 months was down about \$1.5 billion in net cash flow, not just benefits. He said that for the fiscal year, the ERB was down 17.3%, putting it at the fifty-seventh percentile, slightly below the median. According to Mr. Jacksha, the large funds are down 20% to 25%, while the smaller funds did better with a high point around \$9.3 billion to \$9.5 billion. He said that today, the funds are at \$7.6 billion.

Mr. Jacksha said that as the markets have rallied, the ERB's equity percentage has gone up. He noted that the ERB fired a manager on August 15, but that the ERB is now going to index that money and probably get as good or better returns. Compared to the median public fund in amounts of equities, the ERB fund is intentionally below the median. He said, "We made an effort to have a lower equity commitment. We were doing that in 2008 when the market turned down on us.". He added that with regard to total fund performance, the ERB is in the top 7% of funds. In comparing the ERB's policy to the median, the ERB would have been about average if it had invested just in indexes. He reported, however, that in some cases, the ERB's management did not perform well, leading to low performance and higher risk

The ERB's fixed income managers underperformed in the last quarter. Mr. Jacksha said, "We talked to them and understood why, and we thought it would turn around.". According to Mr. Jacksha, the managers were involved in less safe treasury assets and owned more corporate bonds and mortgages. He said that the ERB fired a couple of managers, including one international manager. He noted that there are costs associated with transferring funds to a new manager and said, "We have been long-term oriented and we have tried to be more opportunistic, especially in this market where certain areas are mispriced. PIMCO is doing well on pretty safe income investments.".

Mr. Jacksha summarized by saying, "In sum, we are not satisfied with the negative \$17 million. We are near the median of other public funds. We are seeing some results of new strategies in place and hope to continue.".

There was discussion concerning the 8% benchmark, and it was asked if the ERB ever met that benchmark. Mr. Jacksha said that in 2006, the 10-year average was at or near 8% and that 1997, 1998 and 1999 were very good years. He added that moving forward and picking up a -20% return for one year has a big effect on the average, which is always influenced by the endpoint.

Mr. Jacksha was asked who would be the one authorizing a deviation if there is a deviation from the ERB's policy. He explained that part of the deviation occurs as part of the market and that there was a decision not to rebalance. He said that there are ranges allowed within the ERB's policy and that if the deviations remain within the range, personnel do not have to go before the board for approval. The ranges allow for market fluctuations. However, outside of the ranges, staff have to go to the board.

Mr. Jacksha reported that the ERB's revenue from contributions last year was \$580 million but that income from investments varies based upon returns. He added that the ERB has a fund it can get cash from in a few days because sometimes the ERB requires more liquidity.

The members next advised Mr. Jacksha that they had information that the ERB had received a subpoena and that the members of the committee would like the ERB to provide to the committee the information that was requested within that subpoena, along with the ERB's responses. Noting that the ERB had received more than one subpoena, Mr. Jacksha said he would defer to his general counsel. The discussion turned as to whether the ERB could, in fact,

provide such information to the committee, since it was the subject of a current grand jury. Representative Heaton requested that the committee be informed relating to the documents referenced in the subpoena.

Representative Heaton also asked the ERB to provide the same information regarding the justification of the 8% benchmark as was requested of the PERA. He added that the committee also wants information regarding how the ERB pays consultants, which was also requested as a written response.

State Investment Council (SIC) Update on Investment Performance Through Second Quarter of 2009 and Overview of Governance Structure, Policies and Processes Under Which SIC Operates

Gary Bland, state investment officer, and Adam Levine, senior deputy state investment officer, started by telling the committee that in light of the detailed interest in the SIC's governance aspects, he and Mr. Levine would first address the SIC's performance and then discuss the governance aspects, addressing any questions members may have in accordance to the letter sent by the committee to the SIC, which is a reference the IOC's letter dated August 19, 2009 urging the SIC to "...cooperate fully, timely and openly in all investigations into and examinations of the SIC's operation, so as to remove any doubt as to the strength, honesty and openness of the SIC's organization and finances."

Mr. Bland told the members that the SIC had a disappointing quarter for a number of reasons and that it is important to remember that this is not a retirement fund and that the distributions are based on a five-year annual rate of return (distributions from the severance tax and the land grant funds). He noted that it is a percentage that changes substantially, paying the state a higher premium for stability on the downside. He said that the SIC had a very slight decline last year.

Mr. Bland explained that the funds come from the Land Grant Permanent Funds, severance taxes and oversight of the tobacco settlement funds and Water Trust Fund, as well as the agencies that participate in some four fund pools.

Mr. Bland briefly explained the industry process whereby short-sellers borrow securities, then take the securities and find someone who wants to borrow them, getting 10% to 12% of the market value. Then, the short-seller invests that cash in secure and safe assets. Mr. Bland said that the SIC had invested in popular assets like mortgage-backed securities that "went into the tank", and as a consequence, the SIC is carrying paper losses on those investments. He further explained that in the SIC's accounting entry, it wrote what it thought the SIC can recoup on a conservative basis, as some may end up being worth only \$.15 on the dollar. He clarified that these securities have not yet been sold.

When asked by the committee if the SIC lent securities, got 102% in cash, put the cash in historically safe investments (which were probably toxic) and lost the cash as a result, Mr. Bland replied, "Yes". He further noted, "We are still in a very defensive mode. We are still holding 10% cash in our equity folder.... Our exposure is starting to get back to the positive territory."

Regarding the severance tax and land grant funds, Mr. Bland and Mr. Levine reported that the SIC is maintaining a conservative posture until it sees what the markets are going to bring.

Members asked if the SIC had written down some of these assets 100%. Mr. Levine answered that some of the assets have no determinable value and have been written down to about \$.15 on the dollar. He noted that a lot of the assets were Lehman Brothers and some of those securities will be tied up in litigation for years. Both Mr. Bland and Mr. Levine noted that these investments were considered low-risk at the time of the investment, but these assets got caught in the credit crunch. Mr. Bland mentioned that the SIC expects to get some recovery back from Countrywide.

There was some discussion about the accounting mode used by the SIC, and Mr. Levine explained to the committee that the SIC uses fair value accounting to price assets, whereas many others use cost accounting. Using cost accounting would keep the value at the cost's basis. Mr. Bland added that he does not think it is fair for clients, so a fair market value is used. Mr. Bland added that the choice was an internal decision.

When asked how the PERA compares to the SIC assets situation, Mr. Jacksha told the members that the agency's unrealized loss is about \$12 million, with a chance at some unknown recovery amount.

The discussion returned to the topic of the subpoenas issued by the United States attorney in Albuquerque and received by both the ERB and the SIC. The SIC's legal counsel, Bryan Otero, addressed the issue, saying that the SIC is working with the issuing agency in an effort to trim down the information being sought. He noted that the number of documents was voluminous. He added that the SIC has been responsive and timely. The SIC has isolated nearly 80 million documents that fit the request. Consequently, providing all of those documents to the committee would be difficult considering the breadth of the request. He added that since the grand jury operates in secrecy, there could be a conflict in supplying the committee with the same specific documents supplied as a result of the subpoenas.

Representative Heaton advised the SIC and ERB representatives, along with their legal counsels, that, although the legislature does not want to interfere with an investigation, by the nature of its representation of the citizens of the state, the members need to know and understand what is happening. He added that legislators must understand the implications of the situation, as it may affect future policy decisions, particularly regarding prudent investing. The issue remained unresolved, with all parties determining that the legal issues need to be researched.

Mr. Levine led a discussion resulting from a question posed by Senator Keller at a previous committee meeting regarding private equities. Greg Kulka, director of private investments for the SIC, told the committee that he did not anticipate seeing significant write-downs relating to private equities. He said that the SIC had hired a third-party company to look at the companies in this portfolio.

A discussion ensued regarding the checks and balances in place, and members noted that the legislature needs to scrutinize these investments, especially with respect to transparency and disclosure. The discussion also touched upon the legislature's need to know about the companies in which the state is investing and if these companies are creating employment opportunities in the state.

Next, Mr. Levine spoke in regards to the governance structure of the SIC, highlighting some of the key policies and procedures as they relate to the Uniform Prudent Investor Act. Mr. Otero stated, "We are fiduciaries to the funds. We act a lot like a registered investment advisor. We are trying to ensure we have good compliance policies.". He added that the SIC is looking at the transparency and disclosure policy and is looking at contracting with a software provider to help with transparency. He told the members that they could report back on the implementation of the compliance program. Some of the committee members were concerned that they should be going before the board with some of these issues, specifically the hiring of consultants.

Committee Business

Ms. Faust reported that she spoke to legal counsel for both the ERB and SIC regarding the letters sent to those agencies by the committee. As a result of the conversations, Ms. Faust and the agencies' lawyers will be working together to understand the scope of the document requests made in the subpoenas and will monitor where the agencies are in complying with the discovery process.

Ms. Faust next addressed the committee inquiry into the State of New York's Martin Act. She led a discussion summarizing the act and comparing it to New Mexico's pertinent related statutes. The Martin Act became law in 1921 and was amended in 1926. It remained a law unused by the State of New York until former New York Attorney General Elliott Spitzer rediscovered it around 2002. The Martin Act gives very broad powers to the state attorney general. Consequently, Mr. Spitzer started using the act to go up against securities brokers and even global warming.

Ms. Faust pointed out that the New Mexico securities act gives most of those powers to the director of the Securities Division of the Regulation and Licensing Department. In New York, the attorney general can launch an investigation without initially determining whether it will be a civil or criminal matter. Thus, the defendant does not know if the defendant has a right to counsel. Ms. Faust pointed out that New Mexico law is very similar and that the Martin Act has simply been broadly interpreted by the state's courts.

Securities Division director Bruce Kohl spoke regarding the New Mexico securities act and his familiarity with the Martin Act. He noted that the Martin Act is similar to New Mexico's securities act, with a major difference being that New York does not register or license securities as is done in New Mexico. The state enacted a new securities act in 2010 based on the Uniform Securities Act. The new act designates the Securities Division as enforcement officers, and it can employ officers for investigation. Mr. Kohl stated that he believes New Mexico has a very strong securities act. He noted that many of the New York cases were brought against large

security firms headquartered in that state. He said that he would be happy to address further issues for the committee. Representative Heaton asked Mr. Kohl to provide the committee with a written form of the pros and cons of the New York statute compared to the New Mexico statute that will go into effect in January.

The committee adjourned at 5:48 p.m.

**MINUTES
of the
FOURTH MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**October 9, 2009
Room 307, State Capitol
Santa Fe**

The fourth meeting of the Investments Oversight Committee for the 2009 interim was called to order by Representative John A. Heaton, chair, on October 9, 2009 at 9:15 a.m. in Room 307 of the State Capitol in Santa Fe.

Present

Rep. John A. Heaton, Chair
Rep. Donald E. Bratton
Sen. Timothy M. Keller
Rep. Larry A. Larranaga
Rep. Henry Kiki Saavedra
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Luciano "Lucky" Varela

Advisory Members

Rep. Andrew J. Barreras
Sen. Carlos R. Cisneros
Rep. Roberto "Bobby" J. Gonzales
Sen. Mary Kay Papen
Rep. Jane E. Powdrell-Culbert
Sen. John C. Ryan
Rep. Sheryl Williams Stapleton
Rep. Shirley A. Tyler
Rep. Richard D. Vigil

Staff

Tom Pollard, Legislative Council Service (LCS)
Doris Faust, LCS

Absent

Sen. John Arthur Smith, Vice Chair
Sen. Tim Eichenberg
Sen. Carroll H. Leavell
Sen. Steven P. Neville

Rep. Miguel P. Garcia
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. William H. Payne
Sen. Michael S. Sanchez
Sen. Peter Wirth

Guests

The guest list is in the original meeting file.

Handouts

Handouts from the meeting are in the original meeting file.

Friday, October 9

New Mexico Educational Retirement Board (ERB) — Recent Investment Performance and Potential Impact of 2010 General Fund Solvency Proposals on the ERB

Leadership of the ERB was brought to the committee on the heels of a report in the *Albuquerque Journal* that detailed how a former top consultant to the ERB admitted recommending making certain investments, although he knew the investments were not necessarily in the best interests of the state. Saul Meyer, a founding partner of Aldus Equity Partners (AEP), was quoted in the article admitting that he recommended certain investments because they would benefit some politically well-connected persons. Mr. Meyer pled guilty, and the firm was fired. Nonetheless, problems remain.

Representative Heaton questioned whether the committee should write the attorney general to note that no one returned calls requesting a report on the attorney general's involvement in the investigation and oversight of the ERB. The committee needs to know what tools it has available to resolve and, potentially, to prosecute these problems.

Jan Goodwin, executive director of the ERB, noted that the United States attorney is already involved and that the ERB is fully cooperating with the investigation and has turned over all materials requested. Discussion turned to the *Foy* lawsuit on behalf of taxpayers against the state for losses from the same series of investments and alleged payoffs. Ms. Goodwin noted that the ERB is not named in the suit, although the suit does name two ERB members. Ms. Goodwin and ERB chief investment officer Bob Jacksha were questioned about the adequacy of the ERB's errors and omissions coverage and were told that the Risk Management Division of the General Services Department can cover ERB members. The board members are also receiving additional training on ethics issues. Ms. Goodwin noted that the ERB is very active in providing regular training to board members.

In other discussion, the chair reminded the committee that the committee has already sent letters asking for documents released in response to subpoenas in the federal lawsuit, but the documents are not available at this time. Ms. Goodwin agreed to give the committee the documents when they are available and remarked that she could "fill this room with documents" if the committee wanted.

Senator Ryan questioned whether the ERB itself was the problem with the investments, but Ms. Goodwin answered that the board's general counsel conducted internal reviews and concluded that there is no internal problem, although no official report has been prepared on the

issue. The senator emphasized that the committee needs to get to the root of the problems, at least in part because the committee has the duty to oversee the functions of the ERB. He asked whether the AEP federal litigation has prodded any changes in policy at the ERB, and Mr. Jacksha answered that the ERB is becoming more involved with information on investments and consultants. The chair noted that the committee has heard before about the ERB policies.

Mr. Pollard told the committee that the New Mexico Legislative Council has instituted a review of all investment policies and hired a company to report on December 15 on the practices for all state investment entities.

Mr. Jacksha explained that he started his internal review with a check on private equity investments, noting the number of funds that have done very well, although the ultimate outcome will not be known for a number of years. He explained how equity investments work and answered questions from committee members on the status of equity funds and fees.

Committee members also asked about the ERB lawsuit against Austin Capital and were provided an update on this issue.

The committee went on to discuss the results of the ERB discussions with actuaries about a one- to two-year delay in implementation of the 2005 bill regarding the ERB funding and the impact of that delay. Ms. Goodwin noted that the delay in funding meant a loss of approximately \$18 million to the ERB and also reported that the ERB is not so concerned about the delay in funding itself, but is very concerned about the precedent the delay creates.

Representative Varela asked whether the state can recoup the \$18 million lost to the general fund now, in the middle of the year. He was answered that the state is now a quarter of the way into the fiscal year, so it already has lost \$5 million. David Abbey, director of the Legislative Finance Committee (LFC), agreed that the ERB should roll back 1% and get the money back prospectively. January 1 would be halfway through the fiscal year, so \$10 million could be available. The big legal question is whether the ERB can get money back retroactively. To recoup the full \$18 million in six to eight months would require a decrease in the employer contribution, in addition to the last year's decrease. The governor has not added the \$18 million into the solvency package.

Legislators were still concerned that the ERB has less money to invest due to the funding delay and discussed ways to solve this problem without unfairly changing a negotiated settlement over employee versus employer contribution. Another problem created if teacher salaries are cut is that their pensions will be cut, since the pension is based on a teacher's highest five years of salary. Other committee comments included concerns about sending a poor message by spending one-time money for recurring needs.

New Mexico Retiree Health Care Authority (NMRHCA) — Recent Investment Performance and Potential Impact of 2010 General Fund Solvency Proposals on the NMRHCA

Wayne Propst, executive director of the NMRHCA, reviewed with committee members a handout to update them on "milestones", including the increase of both employer and employee contributions, extended solvency from 2014 to 2028, implementation of cost sharing in the Medicare supplement plan, consolidation of three non-Medicare plans into two plans and improved administration. The NMRHCA is fully staffed for the first time in four years. Mr. Propst projected savings from all the milestones mentioned — \$5 million from collapsing three plans into two, \$2.8 million from replacing a highly customized Medicare supplement plan with a standard Medigap plan, \$500,000 from adding a new carrier and a Medicare Advantage Plan and \$1.3 million from changing the prescription plan to decrease copays for generics and increase copays for brand drugs.

Mr. Propst emphasized the policy of the NMRHCA board not to deficit-spend and noted that the board expects a small surplus from fiscal year 2010.

The NMRHCA faces many budget challenges. Removal of an additional \$3 million from the tax suspense fund for fiscal years 2010 and 2011 would change the authority's projected \$1 million surplus to a \$2 million deficit. The NMRHCA would have to raise retiree premiums by 48.5% in order to avoid deficit spending in fiscal year 2011 or face a deficit of \$31 million if it does not increase the employer and employee contribution as provided in House Bills 351 and 573. Otherwise, it is possible that the NMRHCA could lose two years of solvency for every year the increase is delayed.

Representative Varela asked about solvency and plans to recover \$3 million this year. Mr. Propst replied that he is not aware of a mechanism to take back the entire \$3 million, but that he would have staff contact the Taxation and Revenue Department on what the real numbers are. Other questions included discussion of oversight of the high-risk pool and the State Investment Council oversight of the authority's investments.

Minutes

Minutes of three committee meetings were unanimously approved upon a motion of Senator Cisneros with a second by Representative Powdrell-Culbert.

Update on Retirement Fund Investment Performance and Basic Determinants of Retirement Fund Stability

Dan White, LFC economist, told the committee that unfunded liabilities in the state's retirement funds have ballooned and increased contributions lie on the horizon. For the state retirement funds that reported actuarial data for 2008, the funded ratio was 77% in 2008, down from 88% for the same plans in 2007. Of all the state retirement systems across the country, 93% have a market value of assets less than pension liabilities — meaning they are underfunded at present.

Michelle Aubel, LFC analyst, told the committee the retirement funds may face declines in long-term solvency. Discussion included reasons for the lag between numbers included in the report and current numbers, the need for a long-term view of return on state retirement investments, alternative investments appropriate for the state's pension plans and whether an expectation of an 8% return on investment is realistic. Senator Sapien said he discussed the possibility of a complete liquidation of New Mexico pension plans as has been done by some private sector companies. Ms. Aubel responded that public pensions are different from private sector plans because the vested property rights of Public Employees Retirement Association (PERA) members are protected.

PERA Presentations: Long-Term Investment Returns and Implications for the Retirement Funds Solvency

Robert Gish, director of investments at the PERA, informed the committee that the PERA funds are outperforming other funds and that it may be premature to "yell fire" now. In previous years, the PERA underreported the funding status and so far, the last seven months have proven that it would be premature to make major changes. Although the PERA is not yet "out of the woods", it is appropriate to look at the long-term prospects for the fund and take action only if necessary.

Representative Varela asked for the PERA fund balances. At the end of September 2009, the balance was \$10.7 billion. The PERA holds 0.68% of the fund in cash, or \$69 million.

Jim Voytko, co-president of R.V. Kuhns and Associates, presented and discussed a handout on the strategic asset allocation and actuarial demands versus investment risk at the PERA. Mr. Voytko said he would like to convey that pension funding decisions are completely different from other legislative budgetary and fiscal discussions. His handout provided an analysis of asset allocation and a discussion of funding benefits with contributions and investment returns. The PERA's objective is to achieve an average annual return of 8%, and the board uses traditional and nontraditional asset classes and active and passive management.

Discussions for the remainder of the afternoon included: the structure of the PERA board and its training and expertise; discussion of active versus passive management of the funds; and the costs of management fees at the various funds.

Adjournment

There being no further business before the committee, the October meeting of the Investments Oversight Committee was adjourned at 4:10 p.m.

**MINUTES
of the
FIFTH MEETING
of the
INVESTMENTS OVERSIGHT COMMITTEE**

**November 30, 2009
State Capitol
Santa Fe**

The fifth meeting of the Investments Oversight Committee for the 2009 interim was called to order by Representative John A. Heaton, chair, on Monday, November 30, 2009, at 9:10 a.m. at the State Capitol in Santa Fe.

Present

Rep. John A. Heaton, Chair
Rep. Donald E. Bratton
Sen. Timothy M. Keller
Rep. Larry A. Larrañaga
Sen. Carroll H. Leavell
Sen. Steven P. Neville
Sen. Henry Kiki Saavedra
Sen. John M. Sapien
Rep. Jim R. Trujillo
Rep. Luciano "Lucky" Varela

Advisory Members

Sen. Carlos R. Cisneros
Rep. Miguel P. Garcia
Sen. Mary Kay Papen
Sen. William H. Payne
Rep. Sheryl Williams Stapleton
Rep. Shirley A. Tyler

Absent

Sen. John Arthur Smith, Vice Chair
Sen. Tim Eichenberg

Rep. Andrew J. Barreras
Rep. Roberto "Bobby" J. Gonzales
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Rep. Jane E. Powdrell-Culbert
Sen. John C. Ryan
Sen. Michael S. Sanchez
Rep. Richard D. Vigil
Sen. Peter Wirth

Other Legislator Present

Sen. Sue Wilson Beffort

Staff

Tom Pollard, Legislative Council Service (LCS)
Doris Faust, LCS
Claudia Armijo, LCS

Guests

The guest list is located in the meeting file.

Monday, November 30

Updates on Recent Investment Performance of the State Investment Council (SIC), Public Employees Retirement Association (PERA) and Educational Retirement Board (ERB)

Bob Jacksha, interim state investment officer, SIC, provided an overview of the SIC's 2009 third-quarter investment performance report, noting that, with the exception of real estate, every other asset category's performance was improved from the previous quarter. He said that the fact that real estate values are reported according to appraised property values explains the struggles in real estate assets.

Mr. Jacksha told the members that market values show the effect of unrealized losses, and they improved from \$75 million from the last reporting. He added that over the last 12 months, combined funds dropped about \$1.1 billion.

When asked to remind committee members of the peak values for the funds, Mr. Jacksha said he would have to look into that. He then told the members that, in his opinion, the report that the members are reviewing is confusing, and his office is contemplating an improved format for future reports. He stated that the report shows where the land grant permanent funds and Severance Tax Permanent Fund rank compared to other like funds. He noted that the land grant permanent funds' performance for various periods is "pretty good", and in any market where there are double-digit returns, it can be expected that the performance of the Severance Tax Permanent Fund will lag behind that of the land grant permanent funds.

Mr. Jacksha told the members that the SIC has work to do regarding the funds' percentile rankings. He also noted that the SIC is working on getting the reports up to date more quickly for reporting purposes.

There was a broad discussion about Dubai and its international investments. The discussion turned to the fact that world markets have become much more interrelated. It was noted that, in general, a typical pension fund now has about 15 percent in international investments.

Members asked Mr. Jacksha for insight into his "game plan" in his new role as interim state investment officer. He responded that the SIC is looking at asset allocation and determining if it needs to shift some assets. He further stated that the SIC needs to review the performance of the various fund managers. He noted that the most important thing in the long term is to meet the SIC's goal of an 8.5 percent return.

There began a discussion regarding performance-based fees and whether they are built into the management fees. Mr. Jacksha mentioned that there is a cost associated with changing managers, so the decision to make such a change is not one to take lightly. He added that some

asset classes have performance-based fees built in, and others do not. According to Mr. Jacksha, hedge funds, private real estate and fixed-income funds are handled in-house, so there are no fees associated with these funds. Mr. Jacksha stated that his philosophy is that New Mexico needs the best managers possible. Consequently, the SIC will look at performance versus flat-fee and will determine what is in the best interest of the state.

Members asked Mr. Jacksha if he has made any major changes at the SIC since he took over his new position. He replied that since he started on October 27, 2009, he has implemented reviews that he expects will result in some changes and also implemented a fund manager review. Neither are completed yet. To clarify, he said that the review of managers will be in public securities and hedge funds. Mr. Jacksha mentioned that the SIC is spending a great deal of time on legal matters, and those matters are consuming a lot of resources.

There was a discussion about the SIC's investments in equities. Mr. Jacksha noted that the SIC may have too much money in equities. He said that the funds lost money in the major downturn, and he thinks that the SIC should look at other allocations with a reduced equity exposure. He noted that 80 percent to 85 percent of the SIC's risk is in equities.

Representative Heaton told Mr. Jacksha that the committee needs information about how the New Mexico private equities programs are performing. Mr. Jacksha responded that he will compile and share information on that subject with the members.

Julian Baca, deputy director, PERA, addressed the committee regarding the PERA's investment performance. He told the members that the fund rose 18 percent in a six-month period. Mr. Baca advised the members that the PERA's cash position was a bit high, but compared to its peers, 80 percent have higher cash allocations. He said the PERA's fees for 2009 were \$13.8 million (15 basis points).

There was a general discussion about the state's obligation relating to the PERA Fund and the Educational Retirement Fund plans and members. Jan Goodwin, executive director, ERB, added that neither of the two retirement boards can act independently to change member benefits or contribution rates. Such acts would require statutory changes. Some committee members expressed concern about the state's ability to maintain the retirement funds due to the number of public employees and effect of the three percent multiplier on employees' retirement pensions.

Terry Slattery, executive director, PERA, told the members that the SIC has national and local ads out for the position of chief investment officer (CIO) and that, so far, the SIC has received 30 replies. He added that the reply date has been extended to early January due to the holidays. He said that the board chair and the investment committee chair will conduct the interviews, with hopes of a decision by March 2010.

Ms. Goodwin reported to the committee regarding the ERB's fund performance. She indicated that overall, the portfolio has been doing very well, and most of the managers have

been performing well. There is one equity manager not doing well; that manager will be at the next meeting to discuss the poor performance with the board. Ms. Goodwin advised the members that Page 10 of the ERB report highlights its performance attribution.

Members inquired about the ERB's personnel, and Ms. Goodwin responded that the ERB was hiring an interim CIO in the hopes that Mr. Jacksha will return in the future. She added that she does not anticipate any major changes from the ERB's plan currently in place.

There was an extensive discussion regarding the ERB's issuance of a request for proposals (RFP) for a search firm to conduct an employment search to fill the interim CIO position. Some members questioned the decision to use an outside firm rather than having the ERB conduct the search, especially because the position is for an approximate nine-month period. It was noted that the committee would like the board to reevaluate the decision to hire the search firm.

The final discussion concerned the amount of distributions from the Educational Retirement Fund and the amount in the fund corpus. Ms. Goodwin told committee members that the Educational Retirement Fund is a mature pension fund with distributions greater than contributions. The fund distributes about \$600 million gross annually and has less coming into the fund in the same period. She noted that the ERB first looks to investment earnings to make up the difference, and then if those earnings are not sufficient, the ERB taps into the fund corpus.

Dan White, financial economist, Legislative Finance Committee, presented a memorandum to the committee regarding the FY 2010 first-quarter report on investment performance. Mr. White advised the committee that the SIC is low on contract funds, so there may be cause for concern regarding the hiring of an outside search firm.

Mr. White reported on the status of the contract for the performance review. He told the members that the results of the review will not be available until early January. He noted that most of the delay was due to the immense number of documents reviewed and produced as a result of the federal subpoenas that have taken priority over the review.

Mr. White's memorandum included highlights pointing out that all state investment agencies produced positive returns during the first quarter of FY 2010. However, the Educational Retirement Fund was the only fund that outperformed quarterly, annual and five-year benchmarks. Also, the SIC- managed land grant and severance tax permanent funds continued to underperform in the first quarter of FY 2010, missing quarterly benchmarks by 170 and 180 basis points, respectively. It was noted that peer rankings, while improved for the ERB, remain extremely low for the SIC and the PERA, particularly in the one-year and five-year time periods.

Overview of Current Statutes Governing the Attorney General's Role in Investigation or Prosecution of Cases Related to State Investments and Discussion of Potential Alternatives for Additional Legislation

Al Lama, chief deputy attorney general, introduced Mary Helen Baker, director of special prosecutions, and Assistant Attorney General Patrick McNertney.

Mr. Lama noted the issues relating to the statute effective in January 2010, and he spoke regarding the State of New York's Martin Act. Mr. Lama discussed the act and how the New York attorney general has aggressively used its provisions. He said that the act also relates to actions being looked at in New Mexico. He mentioned that the Martin Act was enacted in the early 1920s and is a broad statute authorizing the attorney general with law enforcement powers. Mr. Lama noted that the definition of "security" in both New Mexico and New York is broad.

Mr. Lama next advised the members that, pursuant to the New Mexico Uniform Securities Act, there are a number of Martin Act components in the new statute effective in January 2010, with the major difference being that in the New Mexico securities statute, the authority is vested in the director of the Securities Division of the Regulation and Licensing Department (RLD), and the director can employ peace officers.

The New Mexico Uniform Securities Act has been expanded to include criminal prosecutions and requires the attorney general to commission a special assistant if requested by the securities director. Mr. McNertney, who joined the Securities Division in 2003, told the members that the New Mexico Uniform Securities Act is a potent tool in the arsenal against investment fraud, noting that it does not require the proof of specific intent to defraud. He said that the New Mexico Uniform Securities Act is a powerful weapon for prosecuting con artists and others with similar ill intentions.

Ms. Baker told the committee that prosecutions pursuant to the statute are expensive. She noted that cases in the Criminal Division of the Attorney General's Office (AGO) typically involve intricate financial transactions with many complicated layers that may seem valid, and typically there are numerous victims. She gave examples of cases prosecuted in New Mexico and highlighted the high costs and the long time frame involved in the prosecutions. Ms. Baker also said that the attorney general is willing to prosecute white collar crime, but it is expensive, and when a person is indicted it will take at least two attorneys, three investigators, two support staff members and an expert. Then a long trial and appeals process are also involved.

Mr. Lama mentioned to the committee that the one thing the AGO representatives hope to tell the legislature is that there is a need for resources for the agency that administers the provisions of the statute.

There was a general discussion regarding what the attorney general might be doing relating to the accusations that New Mexico is a "pay to play" state. The AGO representatives were unable to answer the members' questions in detail, but they assured members that the AGO is cooperating with the federal agencies involved. Mr. Lama noted that the attorney general is

looking into any opportunities for a civil action, but he could not talk about an ongoing criminal investigative process.

The idea of a joint task force between the AGO and the Securities Division was discussed. It was noted that there is a need for the agencies to work together. There is expertise in both agencies, and a joint effort would be helpful. Also, the Securities Division is in charge of licensing and can ensure that securities are registered. Historically, the division has not had experienced prosecutors, nor has it had investigators who understand white collar crime, specifically a securities case.

Bruce Kohl, director, Securities Division, RLD, said it is key to remember that the attorney general can independently bring a prosecution and does not require a referral from the Securities Division. One of the obvious problems faced by the Securities Division is the potential conflict of interest of an executive agency investigating another executive agency.

There was a discussion regarding the statute of limitations. Mr. McNertney noted that the statute of limitations in securities cases is five years, and there is a criminal tolling statute giving prosecutors more time to prosecute. Additionally, he noted that there is not a statute of limitations under the securities law for civil actions.

Update on the Status of the Independent Fiduciary and Operational Review of the SIC, PERA and ERB Investment Programs and the Deliberation of the Retirement Systems Solvency Task Force.

Raul Burciaga, assistant director for drafting services, LCS, told the members of the committee that the evaluation committee first selected three finalists. The successful offer came from Ennis Knupp, a company out of Chicago. The contract was signed on September 4, 2009. It was initially approved for \$300,000; however, bids came in from \$300,000 to \$800,000. The best and final bid came down to \$413,000 for the same scope of work as set forth in the RFP, with an inclusion of \$10,000 for travel.

According to Mr. Burciaga, the selection of Ennis Knupp was based on evaluation points as set out in the RFP as well as confirmation with the company's references related to the quality of its work.

Mr. Burciaga explained that Ennis Knupp representatives met with the investment agencies and asked for certain documents. A large volume of documents was provided over the following weeks by the agencies. However, there was a delay in getting some of the documents from some of the agencies. Some of this delay was due to the competing requests for documents from federal authorities.

Mr. Burciaga told the members that there have been some conversations with Ennis Knupp about potential constitutional or statutory recommendations as a result of its review. The final recommendations will not be available until the report is submitted. However, based on the conversations, there may be some recommendations relating to budget and staffing autonomy;

custodial bank selection; hiring and termination of the State Investment Office (SIO) for the SIC; the role of the SIO on the SIC; open meetings and records requirements that may negatively affect the value of investments; the SIO standard of prudence; global equity approach and limits; and the orientation and continuing education of board and council members. The dates for Ennis Knupp to present its findings have not yet been finalized.

The members inquired as to anything in the final report that might indicate what other states are doing. Mr. Burciaga replied that the scope of work in the contract calls for Ennis Knupp to look at best practices and also policy practice procedures relating to industry standards. The committee asked for a copy of Mr. Burciaga's report summary discussing the scope of work pursuant to the contract, and Mr. Burciaga agreed to provide the information.

Mr. Burciaga reported to the committee regarding the Retirement Systems Solvency Task Force (RSSTF). The RSSTF was created by Laws 2009, Chapter 288, Section 19, which was House Judiciary Committee Substitute for House Education Committee Substitute for House Bill 573, introduced by Representative Heaton. The RSSTF was charged with looking at the solvency of the retirement funds.

Mr. Burciaga reported that at the first meeting of the task force, staff from each of the three retirement systems presented a primer or overview of their respective retirement programs, where they stood financially and what changes had been made to shore up the respective funds.

At the second meeting of the task force, the Retiree Health Care Authority (RHCA) provided an overview of its annual meeting and the progress on unfunded liability and solvency. In 2008, the RHCA decreased its unfunded liability from \$4.1 billion to \$2.9 billion, and the annual contribution required to fund the benefit fully decreased from \$373 million to \$273 million. Solvency has been extended from FY 2014 to FY 2028, although deficit spending is projected to begin in FY 2018. The agency has a history of premiums for retirees that have not kept up with medical trends; benefit plans were not rationalized in terms of cost and subsidies. Additionally, the task force had a presentation on actuarial information by Gabriel, Roeder, Smith & Company (GRS), which is the actuarial firm for both the PERA and the ERB. Chris Conradi of GRS provided an overview of the retirement plans used in various states and the risk characteristics of each defined benefit and contribution and of hybrid plans. Mr. Conradi also presented a overview on the role of the actuary in retirement plans and actuarial mathematics, including actuarial accrued liability, actuarial value of assets and unfunded actuarial accrued liability. The task force also discussed a number of measures to be considered for possible eligibility, benefits and funding related to the three retirement systems.

In its third meeting, the task force received a presentation from Ron Snell, a staff member of the National Conference of State Legislatures (NCSL), on an overview of other states' initiatives on retirement systems. Mr. Snell reported that actions by other states for revising retirement plans between 2005 and 2009 have included:

- increases in employee contributions;

- extending the period over which salary is calculated for the purpose of determining retirement benefits;
- increases in age or service requirements;
- anti-spiking provisions;
- reduction in greater controls over post-retirement cost-of-living adjustments; and
- early retirement incentives.

Marcia Beard of RV Kuhns & Associates, Inc., provided the task force with a discussion on strategic asset allocation. She opened her presentation by stating that "greater return equals greater risk". Ms. Beard spoke about the need for each agency to decide on strategic asset allocation that balances how conservative each board needs to be to protect assets versus how conservative each board can afford to be given the need for additional contributions if investment returns fall short.

The October meeting was canceled because of the special session.

The RSSTF last met on November 12. At that meeting, each retirement system presented on the status of its actuarial studies and initiatives. The PERA reported on a cash-flow projection and benefit-adequacy study to be performed by GRS.

In short, the RHCA inherited premiums that are not keeping up with health care plans. The NCSL provided an overview of other states' retirement plans. Some actions include increasing employee contributions and expanding the number of years. The RHCA is in a wait-and-see mode, depending on what may come out of discussions on national health care. The RHCA is getting two actuarial reports completed. The plan at this point is to re-create the task force after the 2010 legislative session.

The members discussed the back-to-work provision and whether it has a significant impact. Mr. Burciaga reported that a cursory view is that its impact is minimal. Some members raised concerns over the long-term impact of the provision and a need to reevaluate it, perhaps by experts.

Committee Business

Representative Heaton told the members that they needed to discuss the five bills the committee is considering for endorsement, and a discussion of the proposed legislation culminated in the committee voting to endorse Senator Keller's bill, which provides the attorney general with similar powers as those set forth in the State of New York's Martin Act; Representative Heaton's bill, which, combined with a similar bill by Senator Keller, would change the board memberships of the ERB, the SIC and the PERA; and a bill sponsored by Representative Trujillo, which would provide for a mechanism whereby PERA members could change their named beneficiaries.

The committee adjourned at 4:40 p.m.

LEGISLATION ENDORSED BY THE COMMITTEE

underscored material = new
[bracketed material] = delete

SENATE BILL

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

FOR THE INVESTMENTS OVERSIGHT COMMITTEE

AN ACT

RELATING TO STATE INVESTMENTS; PROVIDING FOR THE STATE
INVESTMENT COUNCIL TO APPOINT THE STATE INVESTMENT OFFICER AND
TO APPOINT MEMBERS TO THE PRIVATE EQUITY INVESTMENT ADVISORY
COMMITTEE; CHANGING MEMBERSHIP OF THE STATE INVESTMENT COUNCIL,
THE PUBLIC EMPLOYEES RETIREMENT BOARD AND THE EDUCATIONAL
RETIREMENT BOARD; PROVIDING FOR ADVISORY COMMITTEES TO THE
STATE INVESTMENT COUNCIL, THE PUBLIC EMPLOYEES RETIREMENT BOARD
AND THE EDUCATIONAL RETIREMENT BOARD; PROVIDING THE STATE
INVESTMENT COUNCIL, THE PUBLIC EMPLOYEES RETIREMENT BOARD AND
THE EDUCATIONAL RETIREMENT BOARD THE POWER TO HIRE CONTRACTORS,
ADVISORS AND FUND MANAGERS; RECONCILING MULTIPLE AMENDMENTS TO
THE SAME SECTION OF LAW IN LAWS 2005.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 6-8-2 NMSA 1978 (being Laws 1957,

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Chapter 179, Section 2, as amended) is amended to read:

"6-8-2. STATE INVESTMENT COUNCIL.--

A. There is created a "state investment council".

The council shall be composed of:

~~[A.]~~ (1) the governor;

~~[B.]~~ (2) the state treasurer;

~~[C.]~~ (3) the commissioner of public lands;

~~[D.]~~ (4) the secretary;

~~[E.] three public members appointed by the governor with the advice and consent of the senate;~~

~~F. the state investment officer; and~~

~~G.]~~ (5) the chief financial officer of a state institution of higher education appointed by the governor with the advice and consent of the senate;

(6) one public member appointed by the president pro tempore of the senate with the advice and consent of the senate;

(7) one public member appointed by the minority floor leader of the senate with the advice and consent of the senate;

(8) one public member appointed by the speaker of the house of representatives with the advice and consent of the senate;

(9) one public member appointed by the minority floor leader of the house of representatives with the

1 advice and consent of the senate; and

2 (10) three public members appointed by the
3 majority of the other nine members, with the advice and consent
4 of the senate.

5 B. The ~~[chairman]~~ chair of the council shall be the
6 governor.

7 C. All actions of the council shall be by majority
8 vote, and at least ~~[three]~~ five members appointed pursuant to
9 ~~[Subsections E and G]~~ Paragraphs (6) through (10) of Subsection
10 A of this section must be present to constitute a quorum.

11 D. Members of the council appointed pursuant to
12 Paragraphs (6) through (10) of Subsection [E] A of this section
13 shall be reimbursed per diem and mileage pursuant to the
14 provisions of the Per Diem and Mileage Act."

15 Section 2. Section 6-8-3 NMSA 1978 (being Laws 1957,
16 Chapter 179, Section 3, as amended) is amended to read:

17 "6-8-3. COUNCIL TERMS AND QUALIFICATIONS.--

18 A. Members of the council appointed ~~[by the~~
19 ~~governor]~~ pursuant to Paragraphs (6) through (10) of Subsection
20 A of Section 6-8-2 NMSA 1978, with the advice and consent of
21 the senate, shall serve for staggered terms of five years.
22 Members of the council shall serve until their successors are
23 appointed and have qualified.

24 B. The members of the council appointed pursuant to
25 Paragraphs (6) through (10) of Subsection [E] A of Section

1 6-8-2 NMSA 1978 shall be qualified by competence and no fewer
2 than ten years' experience in the field of investment or
3 finance. During tenure, a member of the council shall not be
4 engaged in any capacity in the sale of securities to the state.
5 Members of the council and officers and employees of the
6 council shall be governed by the provisions of the [~~Conflict of~~
7 ~~Interest~~] Governmental Conduct Act. Nothing in this section or
8 in the [~~Conflict of Interest~~] Governmental Conduct Act shall be
9 construed as prohibiting an officer of a financial institution
10 from participating as a member of the council in setting
11 general policies of the council, nor shall any provision of the
12 [~~Conflict of Interest~~] Governmental Conduct Act prohibit the
13 council or the state treasurer from depositing funds under the
14 jurisdiction of the council in any financial institution. A
15 council member shall not hold an office or employment in a
16 political party.

17 C. Any member of the council appointed pursuant to
18 Paragraphs (6) through (10) of Subsection [~~E or G~~] A of Section
19 6-8-2 NMSA 1978 may be removed from the council by the
20 governor, for cause, in the manner provided for removal of
21 members of boards of regents under Article 12, Section 13 of
22 the constitution of New Mexico. A vacancy in the membership of
23 the council occurring other than by expiration of term shall be
24 filled in the same manner as the original appointment but for
25 the unexpired term only."

1 Section 3. Section 6-8-4 NMSA 1978 (being Laws 1957,
2 Chapter 179, Section 4, as amended) is amended to read:

3 "6-8-4. INVESTMENT OFFICE--STATE INVESTMENT OFFICER--
4 TERMS.--

5 A. There is established an "investment office".
6 The chief administrative officer of the office shall be known
7 as the "state investment officer".

8 B. The state investment officer shall be appointed
9 by ~~[the governor]~~ a majority of the council with the advice and
10 consent of the senate. ~~[Recommendations as to his appointment~~
11 ~~shall be made to the governor by the investment council.]~~ The
12 state investment officer shall devote ~~[his]~~ the officer's
13 entire time and attention to the duties of ~~[his]~~ that office
14 and shall not engage in any other occupation or profession ~~[nor~~
15 ~~shall he]~~ or hold any other public office, appointive or
16 elective. ~~[He]~~ The state investment officer shall be a person
17 qualified, by training and investment experience, to direct the
18 work of the investment ~~[division and]~~ office, shall have had at
19 least five years' professional experience as an investment
20 officer ~~[He]~~ and shall receive a salary to be determined by the
21 state investment council but in no case less than fifty
22 thousand dollars (\$50,000) annually.

23 C. The state investment officer shall serve for an
24 initial term of two years beginning July 1, 1981 and thereafter
25 for terms of four years. The state investment officer may be

1 removed from office by the ~~[governor]~~ council for cause in the
2 manner provided for removal of members of boards of regents
3 under Article 12, Section 13 of the constitution of New
4 Mexico."

5 Section 4. Section 6-8-7 NMSA 1978 (being Laws 1957,
6 Chapter 179, Section 7, as amended by Laws 2005, Chapter 194,
7 Section 1 and by Laws 2005, Chapter 240, Section 1) is amended
8 to read:

9 "6-8-7. POWERS AND DUTIES OF THE STATE INVESTMENT COUNCIL
10 AND STATE INVESTMENT OFFICER--INVESTMENT POLICY--INVESTMENT
11 MANAGERS.--

12 A. Subject to the limitations, conditions and
13 restrictions contained in policy-making regulations or
14 resolutions adopted by the council, ~~[and subject to prior~~
15 ~~authorization by]~~ the council ~~[the state investment officer]~~
16 may make purchases, sales, exchanges, investments and
17 reinvestments of the assets of all funds ~~[administered under~~
18 ~~the supervision of the council]~~ in accordance with the Uniform
19 Prudent Investor Act. The ~~[state investment officer]~~ council
20 shall see that money invested is at all times handled in the
21 best interests of the state.

22 B. The state investment officer shall formulate and
23 recommend to the council for approval investment regulations or
24 resolutions pertaining to the kind or nature of investments and
25 limitations, conditions and restrictions upon the methods,

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1 practices or procedures for investment, reinvestment, purchase,
2 sale or exchange transactions that should govern the activities
3 of the investment office.

4 C. The council shall meet at least once each month,
5 and as often as exigencies may demand, to consult with the
6 state investment officer concerning the work of the investment
7 office. The council shall have access to all files and records
8 of the investment office and shall require the state investment
9 officer to report on and provide information necessary to the
10 performance of council functions. The council may hire one or
11 more investment management firms to advise the council with
12 respect to the council's overall investment plan for the
13 investment of all funds managed by the investment office and
14 pay reasonable compensation for such advisory services from the
15 assets of the applicable funds, subject to budgeting and
16 appropriation by the legislature. The terms of any such
17 investment management services contract shall incorporate the
18 statutory requirements for investment of funds under the
19 council's jurisdiction.

20 D. All funds managed by the state investment
21 officer shall be managed in accordance with the Uniform Prudent
22 Investor Act. ~~[With the approval of]~~ The council ~~[the state~~
23 ~~investment officer]~~ may employ investment management services
24 to invest the funds and may pay reasonable compensation for
25 investment management services from the assets of the

1 applicable funds, subject to budgeting and appropriation by the
2 legislature.

3 E. For funds available for investment for more than
4 one year, the [~~state investment officer~~] council may contract
5 with any state agency to provide investment advisory or
6 investment management services, separately or through a pooled
7 investment fund, provided the state agency enters into a joint
8 powers agreement with the council and that state agency pays at
9 least the direct cost of such services. Notwithstanding any
10 statutory provision governing state agency investments, the
11 [~~state investment officer~~] council may invest funds available
12 from a state agency pursuant to a joint powers agreement in any
13 type of investment permitted for the land grant permanent funds
14 under the prudent investor rule. In performing investment
15 services for a state agency, the council and the state
16 investment officer are exempt from the New Mexico Uniform
17 Securities Act [~~of 1986~~]. As used in this subsection, "state
18 agency" means any branch, agency, department, board,
19 instrumentality, institution or political subdivision of the
20 state, the New Mexico finance authority, the New Mexico
21 mortgage finance authority and any tax-exempt private endowment
22 entity whose sole beneficiary is a state agency.

23 F. The state investment officer shall provide
24 quarterly performance reports to the legislative finance
25 committee. Annually, the state investment officer shall ratify

1 and provide written investment policies, including any
2 amendments, to the legislative finance committee."

3 Section 5. Section 6-8-20 NMSA 1978 (being Laws 1987,
4 Chapter 219, Section 3, as amended) is amended to read:

5 "6-8-20. PRIVATE EQUITY INVESTMENT ADVISORY COMMITTEE
6 CREATED--MEMBERSHIP--DUTIES--TERMS--LIABILITIES--CONFLICT OF
7 INTEREST.--

8 A. There is created the "private equity investment
9 advisory committee" to the council. The committee consists of
10 the state investment officer, a member of the council appointed
11 by the ~~[governor]~~ council and three members who are qualified
12 by competence and experience in finance and investment and
13 knowledgeable about the private equity investment process and
14 who are appointed by the ~~[governor]~~ council.

15 B. Members appointed by the ~~[governor]~~ council,
16 except the council member, shall be appointed for three-year
17 terms; provided that the terms of the initial committee members
18 shall be staggered so that the term of one member expires each
19 year. After the initial appointments, all ~~[governor]~~ appointed
20 members shall be appointed for three-year terms. Members shall
21 serve until their successors are appointed. A vacancy
22 occurring other than by expiration of term shall be filled in
23 the same manner as the original appointment, but only for the
24 unexpired term.

25 C. The committee shall review and make

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1 recommendations to the council on investments authorized
2 pursuant to Sections 7-27-5.15 and 7-27-5.26 NMSA 1978 and all
3 other private equity investments and shall advise the council
4 in matters and policies related to such investments. The
5 committee shall establish policies for national private equity
6 fund investments, New Mexico private equity fund investments
7 and New Mexico film private equity fund investments not less
8 often than annually and shall make copies available to
9 interested parties.

10 D. Members of the committee shall receive per diem
11 and mileage as provided for nonsalaried public officers in the
12 Per Diem and Mileage Act and shall receive no other
13 compensation, perquisite or allowance.

14 E. The committee shall elect annually a ~~[chairman]~~
15 chair from among its members and may elect other officers as
16 necessary. The committee shall meet upon the call of the
17 ~~[chairman]~~ chair or the state investment officer.

18 F. Members of the committee are public employees
19 within the meaning of the Tort Claims Act and are entitled to
20 all immunity and indemnification provided under that act.

21 G. A person shall not be a member of the committee
22 if any recommendation, action or decision of the committee will
23 or is likely to result in direct, measurable economic gain to
24 that person or that person's employer.

25 ~~[H. The state investment officer may enter into~~

1 ~~contracts with investment advisors for private equity fund~~
2 ~~investments and film fund investments authorized pursuant to~~
3 ~~Sections 7-27-5.15 and 7-27-5.26 NMSA 1978 and all other~~
4 ~~private equity investments and may pay budgeted expenses for~~
5 ~~the advisors from the assets of any fund administered under the~~
6 ~~supervision of the council, as applicable.~~

7 ~~I.]~~ H. As used in this section, "private equity
8 investments" means any legal entity that has as its primary
9 business activity the investment of funds in return for equity
10 in or debt of businesses for the purpose of providing capital
11 for startup, expansion, new product development,
12 recapitalization or a similar business purpose."

13 Section 6. Section 10-11-130 NMSA 1978 (being Laws 1987,
14 Chapter 253, Section 130, as amended) is amended to read:

15 "10-11-130. RETIREMENT BOARD--AUTHORITY--MEMBERSHIP.--

16 A. The "retirement board" is created and is the
17 trustee of the association and the funds created by the state
18 retirement system acts and has all the powers necessary or
19 convenient to carry out and effectuate the purposes and
20 provisions of the state retirement system acts, including, in
21 addition to any specific powers provided for in the Public
22 Employees Retirement Act but without limiting the generality of
23 the foregoing, the power to:

24 (1) administer the state retirement system
25 acts, including the management of the association and making

1 effective the provisions of those acts, as well as to
2 administer and manage any other employee benefit acts as
3 provided by law;

4 (2) in addition to utilizing services of the
5 attorney general and notwithstanding any other provision of
6 law, employ or contract with and compensate competent legal
7 counsel to handle the legal matters and litigation of the
8 retirement board and the association and to give advice and
9 counsel in regard to any matter connected with the duties of
10 the retirement board;

11 (3) administer oaths;

12 (4) adopt and use a seal for authentication of
13 records, processes and proceedings;

14 (5) create and maintain records relating to
15 all members, affiliated public employers and all activities and
16 duties required of the retirement board;

17 (6) issue subpoenas and compel the production
18 of evidence and attendance of witnesses in connection with any
19 hearings or proceedings of the retirement board;

20 (7) make and execute contracts;

21 (8) make purchases, sales, exchanges,
22 investments and reinvestments of all funds and employ
23 contractors, advisors or investment management services;

24 [~~8~~] (9) purchase, acquire or hold land
25 adjacent to the state capitol grounds or other suitable

1 location and build thereon a building to house the association
2 and its employees and, in the event additional office space is
3 available in the building after the retirement board and its
4 employees have been housed, to rent or lease the additional
5 space to any public agency or private person; provided that
6 first priority for the rental or leasing shall be to public
7 agencies and further provided that for the purpose of
8 purchasing, acquiring or holding the land and the building
9 thereon, the retirement board may use funds from the income
10 fund and any other funds controlled by the retirement board the
11 use of which for such purposes is not prohibited by law;

12 [~~(9)~~] (10) after the sale of the land and
13 building acquired pursuant to Paragraph [~~(8)~~] (9) of this
14 subsection, acquire land and build thereon a new building to
15 house the association and its employees and hold the building
16 and land in fee simple in the name of the association. In
17 order to acquire the land and plan, design and construct the
18 building, the retirement board may expend the proceeds of the
19 sale of the land and building acquired pursuant to Paragraph
20 [~~(8)~~] (9) of this subsection or any funds controlled by the
21 board, the use of which for such purposes is not otherwise
22 prohibited by law;

23 [~~(10)~~] (11) make and adopt such reasonable
24 rules as may be necessary or convenient to carry out the duties
25 of the retirement board and activities of the association,

1 including any rules necessary to preserve the status of the
2 association as a qualified pension plan under the provisions of
3 the Internal Revenue Code of 1986, as amended, or under
4 successor or related provisions of law; and

5 ~~[(11)]~~ (12) designate committees and designate
6 committee members, including individuals who may not be members
7 of the association.

8 B. The retirement board consists of:

9 (1) the secretary of state;

10 (2) the state treasurer;

11 (3) the state auditor;

12 ~~[(3)]~~ (4) four members under a state coverage
13 plan to be elected by the members under state coverage plans;

14 ~~[(4)]~~ (5) four members under a municipal
15 coverage plan to be elected by the members under municipal
16 coverage plans, provided one member shall be a municipal member
17 employed by a county; ~~and~~

18 ~~(5)]~~ (6) two retired members to be elected by
19 the retired members of the association; and

20 (7) three members appointed by a majority of
21 the other members for terms of four years who possess at least
22 ten years of investment or public finance experience.

23 C. The results of elections of elected members of
24 the retirement board shall be certified at the annual meeting
25 of the association. Elections shall be conducted according to

1 rules the retirement board adopts from time to time.

2 D. The regular term of office of the elected
3 members of the retirement board is four years. The term of one
4 retirement board member under a state coverage plan expires
5 annually on December 31. The terms of retirement board members
6 under a municipal coverage plan expire on December 31 of
7 noncoinciding years in the pattern set by the retirement board.
8 Members of the retirement board serve until their successors
9 have qualified.

10 E. A member elected to the retirement board who
11 fails to attend four consecutively scheduled meetings of the
12 retirement board, unless in each case excused for cause by the
13 retirement board members in attendance, is considered to have
14 resigned from the retirement board, and the retirement board
15 shall by resolution declare the office vacated as of the date
16 of adoption of the resolution. A vacancy occurring on the
17 retirement board, except in the case of an elected official,
18 shall be filled by the remaining retirement board members,
19 without requirement that a quorum be present. The member
20 appointed to fill the vacancy serves for the remainder of the
21 vacated term.

22 F. Members of the retirement board serve without
23 salary for their services as retirement board members, but they
24 shall receive those amounts authorized under the Per Diem and
25 Mileage Act.

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1 G. The retirement board shall hold four regular
2 meetings each year and shall designate in advance the time and
3 place of the meetings. Special meetings and emergency meetings
4 of the retirement board may be held upon call of the [~~chairman~~]
5 chair or any three members of the retirement board. Written
6 notice of special meetings shall be sent to each member of the
7 retirement board at least seventy-two hours in advance of the
8 special meeting. Verbal notice of emergency meetings shall be
9 given to as many members as is feasible at least eight hours
10 before the emergency meeting, and the meeting shall commence
11 with a statement of the nature of the emergency. The
12 retirement board shall adopt its own rules of procedure and
13 shall keep a record of its proceedings. All meetings of the
14 retirement board shall comply with the Open Meetings Act. A
15 majority of retirement board members shall constitute a quorum.
16 Each attending member of the retirement board is entitled to
17 one vote on each question before the retirement board, and at
18 least a majority of a quorum shall be necessary for a decision
19 by the retirement board.

20 H. Annual meetings of the members of the
21 association shall be held in Santa Fe at such time and place as
22 the retirement board shall from time to time determine.
23 Special meetings of the members of the association shall be
24 held in Santa Fe upon call of any seven retirement board
25 members. The retirement board shall send a written notice to

1 the last known residence address of each member currently
2 employed by an affiliated public employer at least ten days
3 prior to any meeting of the members of the association. The
4 notice shall contain the call of the meeting and the principal
5 purpose of the meeting. All meetings of the association shall
6 be public and shall be conducted according to procedures the
7 retirement board shall from time to time adopt. The retirement
8 board shall keep a record of the proceedings of each meeting of
9 the association.

10 I. Neither the retirement board nor the association
11 shall allow public inspection of, or disclosure of, information
12 from any member or retiree file unless a prior release and
13 consent, in the form prescribed by the association, has been
14 executed by the member or retiree; except that applicable
15 coverage plans, amounts of retirement plan contributions made
16 by members and affiliated public employers, pension amounts
17 paid and the names and addresses of public employees retirement
18 association members or retirees requested for election purposes
19 by candidates for election to the retirement board may be
20 produced or disclosed without release or consent."

21 Section 7. Section 22-11-3 NMSA 1978 (being Laws 1967,
22 Chapter 16, Section 127, as amended) is amended to read:

23 "22-11-3. EDUCATIONAL RETIREMENT BOARD--MEMBERS--TERMS--
24 VACANCIES.--

25 A. The "educational retirement board" is created.

1 B. The board shall be composed of [~~seven~~] ten
2 members, consisting of the following:

3 (1) the [~~superintendent~~] secretary of public
4 [~~instruction~~] education;

5 (2) the state treasurer;

6 [~~(3) one member to be elected for a term of~~
7 ~~four years by members of the New Mexico association of~~
8 ~~educational retirees;~~]

9 (3) the state auditor;

10 (4) the chief financial officer of a four-year
11 state institution of higher education appointed by the
12 governor;

13 [~~(4)~~] (5) one member to be elected for a term
14 of four years by the members of the [~~New Mexico~~] national
15 education association of New Mexico;

16 [~~(5)~~] (6) one member to be elected for a term
17 of four years by the New Mexico members of the American
18 association of university professors; [~~and~~

19 (6)] (7) two members to be appointed by the
20 governor for terms of four years each;

21 (8) one member to be appointed by the governor
22 for a term of four years who possesses at least ten years of
23 investment or public finance experience; and

24 (9) one member to be appointed by the council
25 of university presidents for a term of four years who possesses

1 at least ten years of investment or public finance experience.

2 C. In the initial composition of the board, the
3 member elected by the members of the American association of
4 university professors shall serve for a term of three years;
5 one member appointed by the governor shall serve for a term of
6 two years; and the other member appointed by the governor shall
7 serve for a term of one year.

8 D. Vacancies occurring in the ~~[term]~~ terms of
9 office of those members appointed by the governor or the
10 council university presidents or elected by an association
11 shall be filled either by the governor or council appointing,
12 or the association electing, a new member to fill the unexpired
13 term."

14 Section 8. Section 22-11-13 NMSA 1978 (being Laws 1967,
15 Chapter 16, Section 137, as amended) is amended to read:

16 "22-11-13. BOARD AUTHORITY TO INVEST THE FUND--PRUDENT
17 INVESTOR STANDARD--INDEMNIFICATION OF BOARD.--

18 A. The board is authorized to invest or reinvest
19 the fund in accordance with the Uniform Prudent Investor Act
20 and may employ contractors, advisors or investment management
21 services in any investment or reinvestment.

22 B. The board shall provide quarterly performance
23 reports to the legislative finance committee and the department
24 of finance and administration. Annually, the board shall
25 ratify and provide its written investment policy, including any

1 amendments, to the legislative finance committee and the
2 department of finance and administration.

3 C. The board or its designated agent may enter into
4 contracts for the temporary exchange of securities for the use
5 by broker-dealers, banks or other recognized institutional
6 investors, for periods not to exceed one year, for a specified
7 fee or consideration. Such a contract shall not be entered
8 into unless the contract is fully secured by a collateralized,
9 irrevocable letter of credit running to the board, cash or
10 equivalent collateral of at least one hundred two percent of
11 the market value of the securities plus accrued interest
12 temporarily exchanged. This collateral shall be delivered to
13 the state fiscal agent or its designee contemporaneously with
14 the transfer of funds or delivery of the securities. Such
15 contract may authorize the board to invest cash collateral in
16 instruments or securities that are authorized fund investments
17 and may authorize payment of a fee from the fund or from income
18 generated by the investment of cash collateral to the borrower
19 of securities providing cash as collateral. The board may
20 apportion income derived from the investment of cash collateral
21 to pay its agent in securities lending transactions.

22 D. Commissions paid for the purchase or sale of any
23 securities pursuant to the provisions of the Educational
24 Retirement Act shall not exceed brokerage rates prescribed and
25 approved by national stock exchanges or by industry practice.

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1 E. Securities purchased for the fund shall be held
2 in the custody of the state treasurer. At the direction of the
3 board, the state treasurer shall deposit with a bank or trust
4 company the securities for safekeeping or servicing.

5 F. The board may consult with the state investment
6 council or the state investment officer; may request from the
7 state investment council or the state investment officer any
8 information, advice or recommendations with respect to
9 investment of the fund; may utilize the services of the state
10 investment council or the state investment officer; and may act
11 upon any advice or recommendations of the state investment
12 council or the state investment officer. The state investment
13 council or the state investment officer shall render investment
14 advisory services to the board upon request and without expense
15 to the board. The board may also employ the investment
16 management services and related management services of a trust
17 company or national bank exercising trust powers or of an
18 investment counseling firm or brokers for the purchase and sale
19 of securities, commission recapture and transitioning services
20 and may pay reasonable compensation for those services from
21 funds administered by the board.

22 G. The board shall annually provide for its members
23 no less than eight hours of training in pension fund investing,
24 fiduciary obligations or ethics. A member elected or appointed
25 to the board who fails to attend the training for two

1 consecutive years shall be deemed to have resigned from the
2 board.

3 H. Members of the board, jointly and individually,
4 shall be indemnified from the fund by the state from all
5 claims, demands, suits, actions, damages, judgments, costs,
6 charges and expenses, including court costs and attorney fees,
7 and against all liability, losses and damages of any nature
8 whatsoever that members shall or may at any time sustain by
9 reason of any decision made in the performance of their duties
10 pursuant to this section."

11 Section 9. A new section of Chapter 6, Article 8 NMSA
12 1978 is enacted to read:

13 "[NEW MATERIAL] ALTERNATIVE INVESTMENT ADVISORY
14 COMMITTEE.--

15 A. An alternative investment advisory committee
16 shall be appointed by the council for any separate alternative
17 investment asset class when the percentage of the portfolio
18 invested by the council in that alternative investment asset
19 class exceeds five hundred million dollars (\$500,000,000) or
20 ten percent. An alternative investment advisory committee
21 shall consist of five members, one of whom shall be the state
22 investment officer and four of whom shall be appointed by the
23 council. Of the members appointed to the committee by the
24 council, at least one, but not more than two, shall be a member
25 of the council and the remainder of the members appointed by

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1 the council shall be public members who are not members of the
2 council. All members appointed by the council shall be
3 qualified by competence, experience and knowledge of the
4 alternative investment asset class for which the advisory
5 committee is created and shall have no less than five years of
6 experience in the field of investment or finance.

7 B. Public members shall be appointed for three-year
8 terms; provided that the terms of the initial committee members
9 shall be staggered so that the term of one member expires each
10 year. After the initial appointments, all public members shall
11 be appointed for three-year terms. Members shall serve until
12 their successors are appointed. A vacancy occurring other than
13 by expiration of term shall be filled in the same manner as the
14 original appointment but only for the unexpired term.

15 C. The council may dissolve an alternative
16 investment advisory committee when the percentage of the
17 portfolio invested by the council in that alternative
18 investment asset class falls below five percent for a period of
19 more than one year.

20 D. An alternative investment advisory committee
21 shall review and make recommendations to the council on its
22 designated alternative investment asset class and shall advise
23 the council in matters and policies related to such
24 investments.

25 E. Members of an alternative investment advisory

1 committee shall receive per diem and mileage as provided for
2 nonsalaried public officers in the Per Diem and Mileage Act and
3 shall receive no other compensation, perquisite or allowance.

4 F. An alternative investment advisory committee
5 shall elect annually a chair from among its members and may
6 elect other officers as necessary. The committee shall meet
7 upon the call of the chair.

8 G. Members of an alternative investment advisory
9 committee are public employees within the meaning of the Tort
10 Claims Act and are entitled to all immunity and indemnification
11 provided under that act.

12 H. A person shall not be a member of an alternative
13 investment advisory committee if any recommendation, action or
14 decision of the committee will or is likely to result in
15 direct, measurable economic gain to that person or that
16 person's employer.

17 I. As used in this section, "alternative
18 investment" means an asset class other than private equity
19 investments as defined in Section 6-8-20 NMSA 1978, a
20 traditional public equity or a fixed income mutual fund and
21 includes New Mexico economic development investments, hedge
22 funds, real estate and real assets."

23 Section 10. A new section of the Public Employees
24 Retirement Act is enacted to read:

25 "[NEW MATERIAL] ALTERNATIVE INVESTMENT ADVISORY

1 COMMITTEE.--

2 A. An alternative investment advisory committee
3 shall be appointed by the retirement board for any separate
4 alternative investment asset class when the percentage of the
5 portfolio invested by the retirement board in that alternative
6 investment asset class exceeds five hundred million dollars
7 (\$500,000,000) or ten percent. An alternative investment
8 advisory committee shall consist of five members, one of whom
9 shall be the chief investment officer of the association and
10 four of whom shall be appointed by the retirement board. Of
11 the members appointed to the committee by the retirement board,
12 at least one, but not more than two, shall be a member of the
13 retirement board and the remainder of the members appointed by
14 the retirement board shall be public members who are not
15 members of the retirement board. All members appointed by the
16 retirement board shall be qualified by competence, experience
17 and knowledge of the alternative investment asset class for
18 which the advisory committee is created and shall have no less
19 than five years of experience in the field of investment or
20 finance.

21 B. Public members shall be appointed for three-year
22 terms; provided that the terms of the initial committee members
23 shall be staggered so that the term of one member expires each
24 year. After the initial appointments, all public members shall
25 be appointed for three-year terms. Members shall serve until

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1 their successors are appointed. A vacancy occurring other than
2 by expiration of term shall be filled in the same manner as the
3 original appointment but only for the unexpired term.

4 C. The retirement board may dissolve an alternative
5 investment advisory committee when the percentage of the
6 portfolio invested by the retirement board in that alternative
7 investment asset class falls below five percent for a period of
8 more than one year.

9 D. An alternative investment advisory committee
10 shall review and make recommendations to the retirement board
11 on its designated alternative investment asset class and shall
12 advise the retirement board in matters and policies related to
13 such investments.

14 E. Members of an alternative investment advisory
15 committee shall receive per diem and mileage as provided for
16 nonsalaried public officers in the Per Diem and Mileage Act and
17 shall receive no other compensation, perquisite or allowance.

18 F. An alternative investment advisory committee
19 shall elect annually a chair from among its members and may
20 elect other officers as necessary. The committee shall meet
21 upon the call of the chair.

22 G. Members of an alternative investment advisory
23 committee are public employees within the meaning of the Tort
24 Claims Act and are entitled to all immunity and indemnification
25 provided under that act.

1 H. A person shall not be a member of an alternative
2 investment advisory committee if any recommendation, action or
3 decision of the committee will or is likely to result in
4 direct, measurable economic gain to that person or that
5 person's employer.

6 I. As used in this section, "alternative
7 investment" means an asset class other than a traditional
8 public equity or fixed income mutual fund and includes New
9 Mexico economic development investments, hedge funds, private
10 equity, real estate and real assets."

11 Section 11. A new section of the Educational Retirement
12 Act is enacted to read:

13 "[NEW MATERIAL] ALTERNATIVE INVESTMENT ADVISORY
14 COMMITTEE.--

15 A. An alternative investment advisory committee
16 shall be appointed by the board for any separate alternative
17 investment asset class when the percentage of the portfolio
18 invested by the board in that alternative investment asset
19 class exceeds five hundred million dollars (\$500,000,000) or
20 ten percent. An alternative investment advisory committee
21 shall consist of five members, one of whom shall be the
22 director and four of whom shall be appointed by the board. Of
23 the members appointed to the committee by the board, at least
24 one, but not more than two, shall be a member of the board and
25 the remainder of the members appointed by the retirement board

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1 shall be public members who are not members of the board. All
2 members appointed by the board shall be qualified by
3 competence, experience and knowledge of the alternative
4 investment asset class for which the advisory committee is
5 created and shall have no less than five years of experience in
6 the field of investment or finance.

7 B. Public members shall be appointed for three-year
8 terms; provided that the terms of the initial committee members
9 shall be staggered so that the term of one member expires each
10 year. After the initial appointments, all public members shall
11 be appointed for three-year terms. Members shall serve until
12 their successors are appointed. A vacancy occurring other than
13 by expiration of term shall be filled in the same manner as the
14 original appointment but only for the unexpired term.

15 C. The board may dissolve an alternative investment
16 advisory committee when the percentage of the portfolio
17 invested by the board in that alternative investment asset
18 class falls below five percent for a period of more than one
19 year.

20 D. An alternative investment advisory committee
21 shall review and make recommendations to the board on its
22 designated alternative investment asset class and shall advise
23 the board in matters and policies related to such investments.

24 E. Members of an alternative investment advisory
25 committee shall receive per diem and mileage as provided for

1 nonsalaried public officers in the Per Diem and Mileage Act and
2 shall receive no other compensation, perquisite or allowance.

3 F. An alternative investment advisory committee
4 shall elect annually a chair from among its members and may
5 elect other officers as necessary. The committee shall meet
6 upon the call of the chair.

7 G. Members of an alternative investment advisory
8 committee are public employees within the meaning of the Tort
9 Claims Act and are entitled to all immunity and indemnification
10 provided under that act.

11 H. A person shall not be a member of an alternative
12 investment advisory committee if any recommendation, action or
13 decision of the committee will or is likely to result in
14 direct, measurable economic gain to that person or that
15 person's employer.

16 I. As used in this section, "alternative
17 investment" means an asset class other than a traditional
18 public equity or fixed income mutual fund and includes New
19 Mexico economic development investments, hedge funds, private
20 equity, real estate and real assets."

21 Section 12. TEMPORARY PROVISION--TRANSITION MEMBERSHIP OF
22 STATE INVESTMENT COUNCIL.--

23 A. The three public members serving on the state
24 investment council on July 1, 2010 shall continue to serve on
25 the council until their term expires.

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1 B. On July 1, 2010, members may be appointed
2 pursuant to Paragraphs (6) through (9) of Subsection A of
3 Section 6-8-2 NMSA 1978 and shall serve on an interim basis
4 until confirmed by the senate; provided that the initial
5 appointees shall, by lot, determine the terms of office for
6 each position so that one position will be for an initial term
7 of one year, two positions will be for initial terms of three
8 years and one position will be for an initial term of five
9 years. Thereafter, the terms shall be for five years.

10 C. After the appointments pursuant to Subsection B
11 of this section, the members, including the members serving on
12 an interim basis, shall select one of the members pursuant to
13 Paragraph (10) of Subsection A of Section 6-8-2 NMSA 1978, who
14 shall serve on an interim basis until confirmed by the senate
15 and whose term shall be for five years. The other three
16 members shall be appointed pursuant to Paragraph (10) of
17 Subsection A of Section 6-8-2 NMSA 1978 as the terms of the
18 public members serving on July 1, 2010 expire.

19 Section 13. EFFECTIVE DATE.--The effective date of the
20 provisions of this act is January 1, 2011.

SENATE BILL

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

FOR THE INVESTMENTS OVERSIGHT COMMITTEE

AN ACT

RELATING TO SECURITIES; AMENDING THE NEW MEXICO UNIFORM
SECURITIES ACT TO ALLOW FOR ENFORCEMENT BY THE ATTORNEY GENERAL
AND TO INCREASE THE STATUTE OF LIMITATIONS; EXPANDING THE
DEFINITION OF "FRAUD".

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 58-13C-102 NMSA 1978 (being Laws 2009,
Chapter 82, Section 102) is amended to read:

"58-13C-102. DEFINITIONS.--As used in the New Mexico
Uniform Securities Act, unless the context otherwise requires:

A. "agent" means an individual, other than a
broker-dealer, who represents a broker-dealer in effecting or
attempting to effect purchases or sales of securities or
represents an issuer in effecting or attempting to effect
purchases or sales of the issuer's securities, but a partner,

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1 officer or director of a broker-dealer or issuer, or an
2 individual having a similar status or performing similar
3 functions, is an agent only if the individual otherwise comes
4 within the term. "Agent" does not include an individual
5 excluded by rule adopted or order issued pursuant to the New
6 Mexico Uniform Securities Act;

7 B. "bank" means:

8 (1) a banking institution organized pursuant
9 to the laws of the United States;

10 (2) a member bank of the federal reserve
11 system;

12 (3) any other banking institution, whether
13 incorporated or not, doing business pursuant to the laws of a
14 state or of the United States, a substantial portion of the
15 business of which consists of receiving deposits or exercising
16 fiduciary powers similar to those permitted to be exercised by
17 national banks pursuant to the authority of the comptroller of
18 the currency pursuant to Section 1 of Public Law 87-722 (12
19 U.S.C. Section 92a) and that is supervised and examined by a
20 state or federal agency having supervision over banks and that
21 is not operated for the purpose of evading the New Mexico
22 Uniform Securities Act; and

23 (4) a receiver, conservator or other
24 liquidating agent of any institution or firm included in
25 Paragraph (1), (2) or (3) of this subsection;

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1 C. "broker-dealer" means a person engaged in the
2 business of effecting transactions in securities for the
3 account of others or for the person's own account.

4 "Broker-dealer" does not include:

- 5 (1) an agent;
6 (2) an issuer;
7 (3) a bank or savings institution described in
8 Paragraph (2) of Subsection D of this section if its activities
9 as a broker-dealer are limited to those specified in
10 Subsections 3(a)(4)(B)(i) through (vi), (viii) through (x) and
11 (xi), if limited to unsolicited transactions; 3(a)(5)(B); and
12 3(a)(5)(C) of the federal Securities Exchange Act of 1934 (15
13 U.S.C. Sections 78c(a)(4) and (5)) or a bank that satisfies the
14 conditions described in Subsection 3(a)(4)(E) of the federal
15 Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4));
16 (4) an international banking institution; or
17 (5) a person excluded by rule adopted or order
18 issued pursuant to the New Mexico Uniform Securities Act;

19 D. "depository institution" means:

- 20 (1) a bank; or
21 (2) a savings institution, trust company,
22 credit union or similar institution that is organized or
23 chartered pursuant to the laws of a state or of the United
24 States, authorized to receive deposits and supervised and
25 examined by an official or agency of a state or the United

1 States if its deposits or share accounts are insured to the
2 maximum amount authorized by statute by the federal deposit
3 insurance corporation, the national credit union share
4 insurance fund or a successor authorized by federal law, or a
5 receiver, conservator or other liquidating agent of such
6 institutions or entities. "Depository institution" does not
7 include:

8 (a) an insurance company or other
9 organization primarily engaged in the business of insurance;

10 (b) a Morris plan bank; or

11 (c) an industrial loan company that is
12 not an "insured depository institution" as defined in Section
13 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C.
14 1813(c)(2), or any successor federal statute;

15 E. "director" means the director of the securities
16 division of the regulation and licensing department;

17 F. "division" means the securities division of the
18 regulation and licensing department, which for purposes of
19 administering the provisions of the New Mexico Uniform
20 Securities Act and conducting investigations of violations of
21 that act shall be considered a law enforcement agency;

22 G. "federal covered investment adviser" means a
23 person registered pursuant to the federal Investment Advisers
24 Act of 1940;

25 H. "federal covered security" means a security that

1 is, or upon completion of a transaction will be, a covered
2 security pursuant to Section 18(b) of the federal Securities
3 Act of 1933 (15 U.S.C. Section 77r(b)) or rules or regulations
4 adopted pursuant to that section;

5 I. "filing" means the receipt pursuant to the New
6 Mexico Uniform Securities Act of a record by the director, or a
7 designee of the director, in a form and format designated by
8 the director;

9 J. "fraud", "deceit" and "defraud" are not limited
10 to common law deceit and need not include scienter or intent to
11 defraud as elements;

12 K. "guaranteed" means guaranteed as to payment of
13 all principal and all interest;

14 L. "institutional investor" means any of the
15 following, whether acting for itself or for others in a
16 fiduciary capacity:

17 (1) a depository institution or international
18 banking institution;

19 (2) an insurance company;

20 (3) a separate account of an insurance
21 company;

22 (4) an investment company as defined in the
23 federal Investment Company Act of 1940;

24 (5) a broker-dealer registered pursuant to the
25 federal Securities Exchange Act of 1934;

1 (6) an employee pension, profit-sharing or
2 benefit plan if the plan has total assets in excess of ten
3 million dollars (\$10,000,000) or its investment decisions are
4 made by a named fiduciary, as defined in the federal Employee
5 Retirement Income Security Act of 1974, that is a broker-dealer
6 registered pursuant to the federal Securities Exchange Act of
7 1934, an investment adviser registered or exempt from
8 registration pursuant to the federal Investment Advisers Act of
9 1940, an investment adviser registered pursuant to the New
10 Mexico Uniform Securities Act, a depository institution or an
11 insurance company;

12 (7) a plan established and maintained by a
13 state, a political subdivision of a state or an agency or
14 instrumentality of a state or a political subdivision of a
15 state for the benefit of its employees, if the plan has total
16 assets in excess of ten million dollars (\$10,000,000) or its
17 investment decisions are made by a duly designated public
18 official or by a named fiduciary, as defined in the federal
19 Employee Retirement Income Security Act of 1974, that is a
20 broker-dealer registered pursuant to the federal Securities
21 Exchange Act of 1934, an investment adviser registered or
22 exempt from registration pursuant to the federal Investment
23 Advisers Act of 1940, an investment adviser registered pursuant
24 to the New Mexico Uniform Securities Act, a depository
25 institution or an insurance company;

1 (8) a trust, if it has total assets in excess
2 of ten million dollars (\$10,000,000), its trustee is a
3 depository institution and its participants are exclusively
4 plans of the types identified in Paragraph (6) or (7) of this
5 subsection, regardless of the size of their assets, except a
6 trust that includes as participants self-directed individual
7 retirement accounts or similar self-directed plans;

8 (9) an organization described in Section
9 501(c)(3) of the federal Internal Revenue Code of 1986
10 (26 U.S.C. Section 501(c)(3)), corporation, Massachusetts trust
11 or similar business trust, limited liability company or
12 partnership, not formed for the specific purpose of acquiring
13 the securities offered, with total assets in excess of ten
14 million dollars (\$10,000,000);

15 (10) a small business investment company
16 licensed by the small business administration pursuant to
17 Section 301(c) of the federal Small Business Investment Act of
18 1958 (15 U.S.C. Section 681(c)) with total assets in excess of
19 ten million dollars (\$10,000,000);

20 (11) a private business development company as
21 defined in Section 202(a)(22) of the federal Investment
22 Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with
23 total assets in excess of ten million dollars (\$10,000,000);

24 (12) a federal covered investment adviser
25 acting for its own account;

1 (13) a "qualified institutional buyer", as
2 defined in Rule 144A(a)(i)(1), other than Rule 144A(a)(1)(H),
3 adopted pursuant to the federal Securities Act of 1933
4 (17 C.F.R. 230.144A);

5 (14) a "major U.S. institutional investor" as
6 defined in Rule 15a-6(b)(4)(i)(17 C.F.R. 240.15a-6) adopted
7 pursuant to the federal Securities Exchange Act of 1934;

8 (15) any other person, other than an
9 individual, of institutional character with total assets in
10 excess of ten million dollars (\$10,000,000) not organized for
11 the specific purpose of evading the New Mexico Uniform
12 Securities Act; or

13 (16) any other person specified by rule
14 adopted or order issued pursuant to the New Mexico Uniform
15 Securities Act;

16 M. "insurance company" means a company organized as
17 an insurance company whose primary business is writing
18 insurance or reinsuring risks underwritten by insurance
19 companies and that is subject to supervision by the insurance
20 commissioner or a similar official or agency of a state;

21 N. "insured" means insured as to payment of all
22 principal and all interest;

23 O. "international banking institution" means an
24 international financial institution of which the United States
25 is a member and whose securities are exempt from registration

1 pursuant to the federal Securities Act of 1933;

2 P. "investment adviser" means a person that, for
3 compensation, engages in the business of advising others,
4 either directly or through publications or writings, as to the
5 value of securities or the advisability of investing in,
6 purchasing or selling securities or that, for compensation and
7 as a part of a regular business, issues or promulgates analyses
8 or reports concerning securities. "Investment adviser"
9 includes a financial planner or other person that, as an
10 integral component of other financially related services,
11 provides investment advice to others for compensation as part
12 of a business or that holds itself out as providing investment
13 advice to others for compensation. "Investment adviser" does
14 not include:

15 (1) an investment adviser representative;

16 (2) a lawyer, accountant, engineer or teacher
17 whose performance of investment advice is solely incidental to
18 the practice of the person's profession;

19 (3) a broker-dealer or its agents whose
20 performance of investment advice is solely incidental to the
21 conduct of business as a broker-dealer and that does not
22 receive special compensation for the investment advice;

23 (4) a publisher, employee or columnist of a
24 bona fide newspaper, news magazine or business or financial
25 publication of general and regular circulation or an owner

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1 operator, producer or employee of a cable, radio or television
2 network, station or production facility, if, in either case:

3 (a) the financial or business news or
4 advice is contained in a publication or broadcast disseminated
5 to the general public; and

6 (b) the content does not consist of
7 rendering advice on the basis of the specific investment
8 situation of each client;

9 (5) a federal covered investment adviser;

10 (6) a bank or a savings institution described
11 in Paragraph (2) of Subsection D of this section; or

12 (7) any other person excluded by rule adopted
13 or order issued pursuant to the New Mexico Uniform Securities
14 Act;

15 Q. "investment adviser representative" means an
16 individual employed by or associated with an investment adviser
17 or federal covered investment adviser and who makes any
18 recommendations or otherwise gives investment advice regarding
19 securities, manages accounts or portfolios of clients,
20 determines which recommendation or advice regarding securities
21 should be given, provides investment advice or holds herself or
22 himself out as providing investment advice, receives
23 compensation to solicit, offer or negotiate for the sale of or
24 for selling investment advice or supervises employees who
25 perform any of the foregoing. "Investment adviser

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1 representative" does not include an individual who:

2 (1) performs only clerical or ministerial
3 acts;

4 (2) is an agent whose performance of
5 investment advice is solely incidental to the individual acting
6 as an agent and who does not receive special compensation for
7 investment advisory services;

8 (3) is employed by or associated with a
9 federal covered investment adviser, unless the individual has a
10 place of business in New Mexico, as "place of business" is
11 defined by rule adopted pursuant to Section 203A of the federal
12 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a) and
13 is:

14 (a) an investment adviser
15 representative, as "investment adviser representative" is
16 defined by rule adopted pursuant to Section 203A of the federal
17 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a); or

18 (b) not a supervised person as
19 "supervised person" is defined in Section 202(a)(25) of the
20 federal Investment Advisers Act of 1940 (15 U.S.C. Section
21 80b-2(a)(25)); or

22 (4) is excluded by rule adopted or order
23 issued pursuant to the New Mexico Uniform Securities Act;

24 R. "issuer" means a person that issues or proposes
25 to issue a security, subject to the following:

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1 (1) the issuer of a voting trust certificate,
2 collateral trust certificate, certificate of deposit for a
3 security or share in an investment company without a board of
4 directors or individuals performing similar functions is the
5 person performing the acts and assuming the duties of depositor
6 or manager pursuant to the trust or other agreement or
7 instrument under which the security is issued;

8 (2) the issuer of an equipment trust
9 certificate or similar security serving the same purpose is the
10 person by which the property is or will be used or to which the
11 property or equipment is or will be leased or conditionally
12 sold or that is otherwise contractually responsible for
13 assuring payment of the certificate; and

14 (3) the issuer of a fractional undivided
15 interest in an oil, gas or other mineral lease or in payments
16 out of production pursuant to a lease, right or royalty is the
17 owner of an interest in the lease or in payments out of
18 production pursuant to a lease, right or royalty, whether whole
19 or fractional, that creates fractional interests for the
20 purpose of sale;

21 S. "legal rate of interest" means the rate of
22 interest set by Subsection A of Section 56-8-4 NMSA 1978 or its
23 successor statutes;

24 T. "nonissuer transaction" or "nonissuer
25 distribution" means a transaction or distribution not directly

1 or indirectly for the benefit of the issuer;

2 U. "offer to purchase" includes an attempt or offer
3 to obtain, or solicitation of an offer to sell, a security or
4 interest in a security for value. "Offer to purchase" does not
5 include a tender offer that is subject to Section 14(d) of the
6 federal Securities Exchange Act of 1934 (15 U.S.C. 78n(d));

7 V. "person" means an individual; corporation;
8 business trust; estate; trust; partnership; limited liability
9 company; association; joint venture; government; governmental
10 subdivision, agency or instrumentality; public corporation; or
11 any other legal or commercial entity;

12 W. "place of business" of a broker-dealer, an
13 investment adviser or a federal covered investment adviser
14 means:

15 (1) an office at which the broker-dealer,
16 investment adviser or federal covered investment adviser
17 regularly provides brokerage or investment advice or solicits,
18 meets with or otherwise communicates with customers or clients;
19 or

20 (2) a location that is held out to the general
21 public as a location at which the broker-dealer, investment
22 adviser or federal covered investment adviser provides
23 brokerage or investment advice or solicits, meets with or
24 otherwise communicates with customers or clients;

25 X. "predecessor act" means the New Mexico

1 Securities Act of 1986;

2 Y. "price amendment" means the amendment to a
3 registration statement filed pursuant to the federal Securities
4 Act of 1933 or, if an amendment is not filed, the prospectus or
5 prospectus supplement filed pursuant to that act that includes
6 a statement of the offering price, underwriting and selling
7 discounts or commissions, amount of proceeds, conversion rates,
8 call prices and other matters dependent upon the offering
9 price;

10 Z. "principal place of business" of a
11 broker-dealer, investment adviser or federal covered investment
12 adviser means the executive office of the broker-dealer,
13 investment adviser or federal covered investment adviser from
14 which the officers, partners or managers of the broker-dealer,
15 investment adviser or federal covered investment adviser
16 direct, control and coordinate the activities of the
17 broker-dealer, investment adviser or federal covered investment
18 adviser;

19 AA. "record", except in the phrases "of record",
20 "official record" and "public record", means information that
21 is inscribed on a tangible medium or that is stored in an
22 electronic or other medium and is retrievable in perceivable
23 form;

24 BB. "sale" includes every contract of sale,
25 contract to sell or disposition of a security or interest in a

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1 security for value, and "offer to sell" includes every attempt
2 or offer to dispose of, or solicitation of an offer to
3 purchase, a security or interest in a security for value. Both
4 terms include:

5 (1) a security given or delivered with, or as
6 a bonus on account of, a purchase of securities or any other
7 thing constituting part of the subject of the purchase and
8 having been offered and sold for value;

9 (2) a gift of assessable stock involving an
10 offer and sale; and

11 (3) a sale or offer of a warrant or right to
12 purchase or subscribe to another security of the same or
13 another issuer and a sale or offer of a security that gives the
14 holder a present or future right or privilege to convert the
15 security into another security of the same or another issuer,
16 including an offer of the other security;

17 CC. "securities and exchange commission" means the
18 United States securities and exchange commission;

19 DD. "security" means a note; stock; treasury stock;
20 security future; bond; debenture; evidence of indebtedness;
21 certificate of interest or participation in a profit-sharing
22 agreement; collateral trust certificate; preorganization
23 certificate or subscription; transferable share; investment
24 contract; voting trust certificate; certificate of deposit for
25 a security; fractional undivided interest in oil, gas or other

1 mineral rights; put, call, straddle, option or privilege on a
2 security, certificate of deposit or group or index of
3 securities, including an interest therein or based on the value
4 thereof; put, call, straddle, option or privilege entered into
5 on a national securities exchange relating to foreign currency;
6 or, in general, an interest or instrument commonly known as a
7 "security"; or a certificate of interest or participation in,
8 temporary or interim certificate for, receipt for, guarantee of
9 or warrant or right to subscribe to or purchase any of the
10 foregoing. "Security":

11 (1) includes both a certificated and an
12 uncertificated security;

13 (2) does not include an insurance or endowment
14 policy or annuity contract pursuant to which an insurance
15 company promises to pay a fixed or variable sum of money either
16 in a lump sum or periodically for life or other specified
17 period;

18 (3) does not include an interest in a
19 contributory or noncontributory pension or welfare plan subject
20 to the federal Employee Retirement Income Security Act of 1974;

21 (4) does not include landowner royalties in
22 the production of oil, gas or other minerals created through
23 the execution of a lease of the lessor's mineral interest;

24 (5) includes an investment in a common
25 enterprise with the expectation of profits to be derived

1 primarily from the efforts of a person other than the investor.
2 As used in this paragraph, "common enterprise" means an
3 enterprise in which the fortunes of the investor are interwoven
4 with those of either the person offering the investment, a
5 third party or other investors;

6 (6) includes any interest in a limited
7 partnership or a limited liability company; and

8 (7) includes as an investment contract an
9 investment in a viatical settlement or similar agreement;

10 EE. "self-regulatory organization" means a national
11 securities exchange registered pursuant to the federal
12 Securities Exchange Act of 1934, a national securities
13 association of broker-dealers registered pursuant to that act,
14 a clearing agency registered pursuant to that act or the
15 municipal securities rulemaking board established pursuant to
16 that act;

17 FF. "sign" means, with present intent to
18 authenticate or adopt a record:

19 (1) to execute or adopt a tangible symbol; or
20 (2) to attach or logically associate with the
21 record an electronic symbol, sound or process;

22 GG. "state" means a state of the United States, the
23 District of Columbia, Puerto Rico, the United States Virgin
24 Islands or any territory or insular possession subject to the
25 jurisdiction of the United States; and

1 HH. "underwriter" means any person who has
2 purchased from an issuer with the intent to offer or sell a
3 security or to distribute any security; who participates or has
4 a direct or indirect participation in any undertaking; or who
5 participates or has a participation in the direct or indirect
6 underwriting of any undertaking. "Underwriter" does not
7 include a person whose interest is limited to a commission from
8 an underwriter or dealer not in excess of the usual and
9 customary distributors' or sellers' commission. As used in
10 this subsection, "issuer" includes any person directly or
11 indirectly controlling or controlled by the issuer; or any
12 person under direct or indirect common control with the
13 issuer."

14 Section 2. Section 58-13C-508 NMSA 1978 (being Laws 2009,
15 Chapter 82, Section 508) is amended to read:

16 "58-13C-508. CRIMINAL PENALTIES.--

17 A. A person who willfully violates Section [~~501 or~~
18 ~~502 of the New Mexico Uniform Securities Act~~] 58-13C-501 or
19 58-13C-502 NMSA 1978 is guilty of a third degree felony and,
20 upon conviction, shall be fined not more than five thousand
21 dollars (\$5,000) or imprisoned not more than three years, or
22 both, for each violation. For purposes of Subsection B of
23 Section 31-18-13 NMSA 1978, the minimum term prescribed by this
24 subsection is three years.

25 B. A person who willfully violates Section [~~505 of~~

1 ~~the New Mexico Uniform Securities Act]~~ 58-13C-505 NMSA 1978
2 knowing the statement made to be false or misleading in a
3 material respect is guilty of a third degree felony and, upon
4 conviction, shall be fined not more than five thousand dollars
5 (\$5,000) or imprisoned not more than three years, or both, for
6 each violation. For purposes of Subsection B of Section
7 31-18-13 NMSA 1978, the minimum term prescribed by this
8 subsection is three years.

9 C. No criminal penalties apply to violations of
10 Section ~~[504 of the New Mexico Uniform Securities Act]~~
11 58-13C-504 NMSA 1978 or the notice filing requirements of
12 Section ~~[302 or 405 of that act]~~ 58-13C-302 or 58-13C-405 NMSA
13 1978.

14 D. Except as provided in Subsections A through C of
15 this section, a person who willfully violates any provision of
16 the New Mexico Uniform Securities Act or a rule adopted or
17 order issued pursuant to that act is guilty of a fourth degree
18 felony and, upon conviction, shall be fined not more than five
19 thousand dollars (\$5,000) or imprisoned not more than eighteen
20 months, or both, for each violation. For purposes of
21 Subsection B of Section 31-18-13 NMSA 1978, the minimum term
22 prescribed by this subsection is eighteen months.

23 E. An individual convicted of violating a rule or
24 order pursuant to the New Mexico Uniform Securities Act may be
25 fined, but shall not be imprisoned, if the individual did not

1 have knowledge of the rule or order.

2 F. For the purposes of this section, "willfully"
3 means purposely or intentionally committing the act or making
4 the omission and does not require an intent to violate the law
5 or knowledge that the act or omission is unlawful.

6 G. Each offense shall constitute a separate
7 offense, and a prosecution for any one of such offenses shall
8 not bar prosecution or conviction for any other offenses.

9 H. All persons convicted of criminal violations of
10 the New Mexico Uniform Securities Act shall be sentenced in
11 accordance with the Criminal Sentencing Act or its successor
12 statute.

13 I. No indictment or information may be brought
14 pursuant to this section more than five years after the alleged
15 violation.

16 J. The attorney general acting without a letter of
17 declination from a district attorney or the proper district
18 attorney, with or without a referral from the director, may
19 institute criminal proceedings pursuant to the New Mexico
20 Uniform Securities Act. The attorney general or district
21 attorney may request assistance from the director or employees
22 of the division. When so requested by the director, the
23 attorney general shall commission as a special assistant
24 attorney general any attorney employed by the director or
25 contracted with by the director and approved by the attorney

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1 general to assist the director in carrying out the director's
2 duties, including providing legal advice and prosecuting
3 offenders.

4 K. The New Mexico Uniform Securities Act does not
5 limit the power of New Mexico to punish a person for conduct
6 that constitutes a crime pursuant to other laws of New Mexico."

7 Section 3. Section 58-13C-509 NMSA 1978 (being Laws 2009,
8 Chapter 82, Section 509) is amended to read:

9 "58-13C-509. CIVIL LIABILITY.--

10 A. Enforcement of civil liability pursuant to this
11 section is subject to the federal Securities Litigation Uniform
12 Standards Act of 1998 (P.L. 105-353, 112 Stat. 3227, et seq.).

13 B. A person is liable to the purchaser if the
14 person sells a security in violation of Section ~~[301 of the New~~
15 ~~Mexico Uniform Securities Act]~~ 58-13C-301 NMSA 1978 or, by
16 means of an untrue statement of a material fact or an omission
17 to state a material fact necessary in order to make the
18 statement made, in light of the circumstances pursuant to which
19 it is made, not misleading, the purchaser not knowing the
20 untruth or omission and the seller not sustaining the burden of
21 proof that the seller did not know and, in the exercise of
22 reasonable care, could not have known of the untruth or
23 omission. An action pursuant to this subsection is governed by
24 the following:

25 (1) the purchaser may maintain an action to

1 recover the consideration paid for the security, less the
2 amount of any income received on the security, and interest at
3 the legal rate of interest from the date of the purchase, costs
4 and reasonable attorney fees determined by the court, upon the
5 tender of the security, or for actual damages as provided in
6 Paragraph (3) of this subsection;

7 (2) the tender referred to in Paragraph (1) of
8 this subsection may be made any time before entry of judgment.
9 Tender requires only notice in a record of ownership of the
10 security and willingness to exchange the security for the
11 amount specified. A purchaser that no longer owns the security
12 may recover actual damages as provided in Paragraph (3) of this
13 subsection; and

14 (3) actual damages in an action arising
15 pursuant to this subsection are the amount that would be
16 recoverable upon a tender less the value of the security when
17 the purchaser disposed of it, and interest at the legal rate of
18 interest from the date of the purchase, costs and reasonable
19 attorney fees determined by the court.

20 C. A person is liable to the seller if the person
21 buys a security by means of an untrue statement of a material
22 fact or omission to state a material fact necessary in order to
23 make the statement made, in light of the circumstances pursuant
24 to which it is made, not misleading, the seller not knowing of
25 the untruth or omission, and the purchaser not sustaining the

1 burden of proof that the purchaser did not know, and in the
2 exercise of reasonable care could not have known, of the
3 untruth or omission. An action pursuant to this subsection is
4 governed by the following:

5 (1) the seller may maintain an action to
6 recover the security, and any income received on the security,
7 costs and reasonable attorney fees determined by the court,
8 upon the tender of the purchase price, or for actual damages as
9 provided in Paragraph (3) of this subsection;

10 (2) the tender referred to in Paragraph (1) of
11 this subsection may be made any time before entry of judgment.
12 Tender requires only notice in a record of the present ability
13 to pay the amount tendered and willingness to take delivery of
14 the security for the amount specified. If the purchaser no
15 longer owns the security, the seller may recover actual damages
16 as provided in Paragraph (3) of this subsection; and

17 (3) actual damages in an action arising
18 pursuant to this subsection are the difference between the
19 price at which the security was sold and the value the security
20 would have had at the time of the sale in the absence of the
21 purchaser's conduct causing liability, and interest at the
22 legal rate of interest from the date of the sale of the
23 security, costs and reasonable attorney fees determined by the
24 court.

25 D. A person acting as a broker-dealer or agent that

1 sells or buys a security in violation of Subsection A of
2 Section ~~[401 of the New Mexico Uniform Securities Act]~~
3 58-13C-401 NMSA 1978, Subsection A of Section ~~[402 of that act]~~
4 58-13C-402 NMSA 1978 or Section ~~[506 of that act]~~ 58-13C-506
5 NMSA 1978 is liable to the customer. The customer, if a
6 purchaser, may maintain an action for recovery of actual
7 damages as specified in Paragraphs (1) through (3) of
8 Subsection B of this section, or, if a seller, for a remedy as
9 specified in Paragraphs (1) through (3) of Subsection C of this
10 section.

11 E. A person acting as an investment adviser or
12 investment adviser representative that provides investment
13 advice for compensation in violation of Subsection A of Section
14 ~~[403 of the New Mexico Uniform Securities Act]~~ 58-13C-403 NMSA
15 1978, Subsection A of Section ~~[404 of that act]~~ 58-13C-404 NMSA
16 1978 or Section ~~[506 of that act]~~ 58-13C-506 NMSA 1978 is
17 liable to the client. The client may maintain an action to
18 recover the consideration paid for the advice, interest at the
19 legal rate of interest from the date of payment, costs and
20 reasonable attorney fees determined by the court.

21 F. A person that receives, directly or indirectly,
22 any consideration for providing investment advice to another
23 person and that employs a device, scheme or artifice to defraud
24 the other person or engages in an act, practice or course of
25 business that operates or would operate as a fraud or deceit on

1 the other person, is liable to the other person. An action
2 pursuant to this subsection is governed by the following:

3 (1) the person defrauded may maintain an
4 action to recover the consideration paid for the advice and the
5 amount of any actual damages caused by the fraudulent conduct,
6 interest at the legal rate of interest from the date of the
7 fraudulent conduct, costs and reasonable attorney fees
8 determined by the court, less the amount of any income received
9 as a result of the fraudulent conduct; and

10 (2) this subsection does not apply to a
11 broker-dealer or its agents if the investment advice provided
12 is solely incidental to transacting business as a broker-dealer
13 and no special compensation is received for the investment
14 advice.

15 G. The following persons are liable jointly and
16 severally with and to the same extent as persons liable
17 pursuant to Subsections B through F of this section:

18 (1) a person that directly or indirectly
19 controls a person liable pursuant to Subsections B through F of
20 this section, unless the controlling person sustains the burden
21 of proof that the person did not know, and in the exercise of
22 reasonable care could not have known, of the existence of
23 conduct by reason of which the liability is alleged to exist;

24 (2) an individual who is a managing partner,
25 executive officer or director of a person liable pursuant to

1 Subsections B through F of this section, including an
2 individual having a similar status or performing similar
3 functions, unless the individual sustains the burden of proof
4 that the individual did not know and, in the exercise of
5 reasonable care could not have known, of the existence of
6 conduct by reason of which the liability is alleged to exist;

7 (3) an individual who is an employee of or
8 associated with a person liable pursuant to Subsections B
9 through F of this section and who materially aids the conduct
10 giving rise to the liability, unless the individual sustains
11 the burden of proof that the individual did not know and, in
12 the exercise of reasonable care could not have known, of the
13 existence of conduct by reason of which the liability is
14 alleged to exist; and

15 (4) a person that is a broker-dealer, agent,
16 investment adviser or investment adviser representative that
17 materially aids the conduct giving rise to the liability
18 pursuant to Subsections B through F of this section, unless the
19 person sustains the burden of proof that the person did not
20 know and, in the exercise of reasonable care could not have
21 known, of the existence of conduct by reason of which liability
22 is alleged to exist.

23 H. A person liable pursuant to this section has a
24 right of contribution as in cases of contract against any other
25 person liable pursuant to this section for the same conduct.

1 I. A cause of action pursuant to this section
2 survives the death of an individual who might have been a
3 plaintiff or defendant.

4 J. A person shall not obtain relief unless the suit
5 is brought:

6 (1) within [~~two~~] four years after discovery of
7 the violation or after discovery should have been made by the
8 exercise of reasonable diligence; and

9 (2) within [~~five~~] ten years after the act or
10 transaction constituting the violation.

11 K. A person that has made, or has engaged in the
12 performance of, a contract in violation of the New Mexico
13 Uniform Securities Act or a rule adopted or order issued
14 pursuant to that act, or that has acquired a purported right
15 pursuant to the contract with knowledge of conduct by reason of
16 which its making or performance was in violation of the New
17 Mexico Uniform Securities Act, may not base an action on the
18 contract.

19 L. A condition, stipulation or provision binding a
20 person purchasing or selling a security or receiving investment
21 advice to waive compliance with the New Mexico Uniform
22 Securities Act, or a rule adopted or order issued pursuant to
23 that act, is void.

24 M. The rights and remedies provided by the New
25 Mexico Uniform Securities Act are in addition to any other

1 rights or remedies that may exist, but that act does not create
2 a cause of action not specified in this section or Subsection E
3 of Section ~~[411 of that act]~~ 58-13C-411 NMSA 1978."

4 Section 4. Section 58-13C-602 NMSA 1978 (being Laws 2009,
5 Chapter 82, Section 602) is amended to read:

6 "58-13C-602. INVESTIGATIONS AND SUBPOENAS.--

7 A. The director or attorney general may:

8 (1) conduct public or private investigations
9 within or outside of New Mexico that the director or attorney
10 general considers necessary or appropriate to determine whether
11 a person has violated, is violating or is about to violate the
12 New Mexico Uniform Securities Act, or a rule adopted or order
13 issued pursuant to that act, or to aid in the enforcement of
14 the New Mexico Uniform Securities Act or in the adoption of
15 rules and forms pursuant to that act;

16 (2) require or permit a person to testify,
17 file a statement or produce a record, under oath or otherwise
18 as the director or attorney general determines, as to all the
19 facts and circumstances concerning a matter to be investigated
20 or about which an action or proceeding is to be instituted; and

21 (3) publish a record concerning an action,
22 proceeding or an investigation pursuant to or a violation of
23 the New Mexico Uniform Securities Act or a rule adopted or
24 order issued pursuant to that act if the director or attorney
25 general determines it is necessary or appropriate in the public

1 interest and for the protection of investors.

2 B. For the purpose of an investigation pursuant to
3 the New Mexico Uniform Securities Act, the director or the
4 director's designated officer or the attorney general may
5 administer oaths and affirmations, subpoena witnesses, seek
6 compulsion of attendance, take evidence, require the filing of
7 statements and require the production of any records that the
8 director or attorney general considers relevant or material to
9 the investigation.

10 C. If a person does not appear or refuses to
11 testify, file a statement, produce records or otherwise does
12 not obey a subpoena as required by the director or attorney
13 general pursuant to the New Mexico Uniform Securities Act, the
14 director or attorney general may apply to the district court of
15 Santa Fe county or other appropriate district court or to a
16 court of another state, a federal court or a court of a foreign
17 jurisdiction, or the director may refer the matter to the
18 attorney general or the proper district attorney to enforce
19 compliance. The court may:

- 20 (1) hold the person in contempt;
21 (2) order the person to appear before the
22 director;
23 (3) order the person to testify about the
24 matter under investigation or in question;
25 (4) order the production of records;

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1 (5) grant injunctive relief, including
2 restricting or prohibiting the offer or sale of securities or
3 the providing of investment advice;

4 (6) impose a civil penalty of not more than
5 ten thousand dollars (\$10,000) for each violation; and

6 (7) grant any other necessary or appropriate
7 relief.

8 D. This section does not preclude a person from
9 applying to the appropriate district court or a court of
10 another state for relief from a request to appear, testify,
11 file a statement, produce records or obey a subpoena.

12 E. An individual is not excused from attending,
13 testifying, filing a statement, producing a record or other
14 evidence or obeying a subpoena of the director or attorney
15 general pursuant to the New Mexico Uniform Securities Act or in
16 an action or proceeding instituted by the director or attorney
17 general pursuant to that act on the grounds that the required
18 testimony, statement, record or other evidence, directly or
19 indirectly, may tend to incriminate the individual or subject
20 the individual to a criminal fine, penalty or forfeiture. If
21 the individual refuses to testify, file a statement or produce
22 a record or other evidence on the basis of the individual's
23 privilege against self-incrimination, the director or attorney
24 general may apply to the district court of Santa Fe county or
25 other appropriate district court or to a court of another

1 state, a federal court or a court of a foreign jurisdiction to
2 compel the testimony, the filing of the statement, the
3 production of the record or the giving of other evidence. The
4 testimony, record or other evidence compelled pursuant to such
5 an order shall not be used, directly or indirectly, against the
6 individual in a criminal case, except in a prosecution for
7 perjury or contempt or otherwise failing to comply with the
8 order.

9 F. At the request of the securities regulator of
10 another state or a foreign jurisdiction, the director or
11 attorney general may provide assistance if the requesting
12 regulator states that it is conducting an investigation to
13 determine whether a person has violated, is violating or is
14 about to violate a law or rule of the other state or foreign
15 jurisdiction relating to securities matters that the requesting
16 regulator administers or enforces. The director or attorney
17 general may provide the assistance by using the authority to
18 investigate and the powers conferred by this section as the
19 director or attorney general determines is necessary or
20 appropriate. The assistance may be provided without regard to
21 whether the conduct described in the request would also
22 constitute a violation of the New Mexico Uniform Securities Act
23 or other law of New Mexico if occurring in New Mexico. In
24 deciding whether to provide the assistance, the director or
25 attorney general may consider whether the requesting regulator

1 is permitted and has agreed to provide assistance reciprocally
2 within its state or foreign jurisdiction to the director or
3 attorney general on securities matters when requested; whether
4 compliance with the request would violate or prejudice the
5 public policy of New Mexico; and the availability of resources
6 and employees of the director or attorney general to carry out
7 the request for assistance."

8 Section 5. Section 58-13C-603 NMSA 1978 (being Laws 2009,
9 Chapter 82, Section 603) is amended to read:

10 "58-13C-603. CIVIL ENFORCEMENT.--

11 A. If the director or attorney general believes
12 that a person has engaged, is engaging or is about to engage in
13 an act, practice or course of business constituting a violation
14 of the New Mexico Uniform Securities Act or a rule adopted or
15 order issued pursuant to that act or that a person has, is or
16 is about to engage in an act, practice or course of business
17 that materially aids a violation of the New Mexico Uniform
18 Securities Act or a rule adopted or order issued pursuant to
19 that act, the director or attorney general may maintain an
20 action to enjoin the act, practice or course of business and to
21 enforce compliance with the New Mexico Uniform Securities Act
22 or a rule adopted or order issued pursuant to that act.

23 B. In an action pursuant to this section and on a
24 proper showing, the court may:

25 (1) issue a permanent or temporary injunction,

1 restraining order or declaratory judgment;

2 (2) order other appropriate or ancillary
3 relief, which may include:

4 (a) an asset freeze, accounting, writ of
5 attachment, writ of general or specific execution and
6 appointment of a receiver or conservator, that may be the
7 director or attorney general, for the defendant or the
8 defendant's assets;

9 (b) ordering the director or attorney
10 general to take charge and control of a defendant's property,
11 including investment accounts and accounts in a depository
12 institution, rents and profits; to collect debts; and to
13 acquire and dispose of property;

14 (c) imposing a civil penalty of up to
15 ten thousand dollars (\$10,000) for each violation;

16 (d) an order of rescission, restitution
17 or disgorgement directed to a person that has engaged in an
18 act, practice or course of business constituting a violation of
19 the New Mexico Uniform Securities Act or the predecessor act or
20 a rule adopted or order issued pursuant to the New Mexico
21 Uniform Securities Act or the predecessor act;

22 (e) ordering the payment of prejudgment
23 and postjudgment interest; and

24 (f) ordering the payment of litigation
25 expenses of the director or attorney general; and

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1 (3) order such other relief as the court
2 considers appropriate.

3 C. If a person violates a provision of the New
4 Mexico Uniform Securities Act and the violation is directed
5 toward, targets or is committed against a person who, at the
6 time of the violation, is sixty-two years of age or older, the
7 court, in addition to any other civil penalties provided for
8 pursuant to the New Mexico Uniform Securities Act or a rule
9 issued pursuant to that act, may impose an additional civil
10 penalty not to exceed ten thousand dollars (\$10,000) for each
11 violation.

12 D. The director or attorney general shall not be
13 required to post a bond in an action or proceeding pursuant to
14 the New Mexico Uniform Securities Act."

15 Section 6. Section 58-13C-608 NMSA 1978 (being Laws 2009,
16 Chapter 82, Section 608) is amended to read:

17 "58-13C-608. UNIFORMITY AND COOPERATION WITH OTHER
18 AGENCIES.--

19 A. The director or attorney general may, in the
20 director's or attorney general's discretion, cooperate,
21 coordinate, consult and, subject to Section [~~607 of the New~~
22 ~~Mexico Uniform Securities Act~~] 58-13C-607 NMSA 1978, share
23 records and information with the securities regulator of
24 another state, Canada, a Canadian province or territory, a
25 foreign jurisdiction, the securities and exchange commission,

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1 the United States department of justice, the commodity futures
2 trading commission, the federal trade commission, the
3 securities investor protection corporation, a self-regulatory
4 organization, a national or international organization of
5 securities regulators, a federal or state banking and insurance
6 regulator and a governmental law enforcement agency to
7 effectuate greater uniformity in securities matters among the
8 federal government, self-regulatory organizations, states and
9 foreign governments.

10 B. In cooperating, coordinating, consulting and
11 sharing records and information pursuant to this section and in
12 acting by rule, order or waiver pursuant to the New Mexico
13 Uniform Securities Act, the director or attorney general shall,
14 in the director's or attorney general's discretion, take into
15 consideration in carrying out the public interest the following
16 general policies:

17 (1) maximizing effectiveness of regulation for
18 the protection of investors;

19 (2) maximizing uniformity in federal and state
20 regulatory standards; and

21 (3) minimizing burdens on the business of
22 capital formation, without adversely affecting essentials of
23 investor protection.

24 C. The cooperation, coordination, consultation and
25 sharing of records and information authorized by this section

1 includes:

2 (1) establishing or employing one or more
3 designees as a central depository for registration and notice
4 filings pursuant to the New Mexico Uniform Securities Act and
5 for records required or allowed to be maintained pursuant to
6 that act;

7 (2) developing and maintaining uniform forms;

8 (3) conducting a joint examination or
9 investigation;

10 (4) holding a joint administrative hearing;

11 (5) instituting and prosecuting a joint civil
12 or administrative proceeding;

13 (6) sharing and exchanging personnel;

14 (7) coordinating registrations pursuant to
15 Sections ~~[301 and 401 through 404 of the New Mexico Uniform~~
16 ~~Securities Act]~~ 58-13C-301 and 58-13C-401 through 58-13C-404
17 NMSA 1978 and exemptions pursuant to Section ~~[203 of that act]~~
18 58-13C-203 NMSA 1978;

19 (8) sharing and exchanging records, subject to
20 Section ~~[607 of the New Mexico Uniform Securities Act]~~
21 58-13C-607 NMSA 1978;

22 (9) formulating rules, statements of policy,
23 guidelines, forms and interpretative opinions and releases;

24 (10) formulating common systems and
25 procedures;

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1 (11) notifying the public of proposed rules,
2 forms, statements of policy and guidelines;

3 (12) attending conferences and other meetings
4 among securities regulators, which may include representatives
5 of governmental and private sector organizations involved in
6 capital formation, deemed necessary or appropriate to promote
7 or achieve uniformity; and

8 (13) developing and maintaining a uniform
9 exemption from registration for small issuers and taking other
10 steps to reduce the burden of raising investment capital by
11 small businesses."

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1 HOUSE BILL
2 **49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010**
3 INTRODUCED BY
4
5
6
7

8 FOR THE INVESTMENTS OVERSIGHT COMMITTEE
9

10 AN ACT
11 RELATING TO PUBLIC EMPLOYEES RETIREMENT; PROVIDING A RETIRED
12 MEMBER WITH A ONE-TIME IRREVOCABLE OPTION TO DESELECT A
13 DESIGNATED SURVIVOR PENSION BENEFICIARY.
14

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

16 Section 1. Section 10-11-116 NMSA 1978 (being Laws 1987,
17 Chapter 253, Section 116, as amended) is amended to read:

18 "10-11-116. ELECTION OF FORM OF PAYMENT OF A PENSION.--

19 A. Except as otherwise provided in Section
20 10-11-136 NMSA 1978, a member may elect to have pension
21 payments made under any one of the forms of payment provided in
22 Section 10-11-117 NMSA 1978. The election of form of payment
23 and naming of survivor pension beneficiary shall be made on a
24 form furnished by and filed with the association prior to the
25 date the first pension payment is made. An election of form of

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1 payment may not be changed after the date the first pension
2 payment is made. If the member is married, the association
3 shall obtain the consent of the member's spouse to the election
4 of the form of payment and any designation of survivor pension
5 beneficiary before the election or designation is effective.

6 Except as provided in Subsection C or D of this section, a
7 named survivor pension beneficiary may not be changed after the
8 date the first pension payment is made if form of payment B or
9 C is elected. Except as otherwise provided in Section
10 10-11-136 NMSA 1978, payment shall be made:

11 (1) under form of payment A if the member is
12 not married at the time of retirement and if there is not a
13 timely election of another form of payment; or

14 (2) under form of payment C with the member's
15 spouse as survivor pension beneficiary if the member is married
16 at the time of retirement and there is not a timely election of
17 another form of payment.

18 B. The amount of pension under forms of payment B,
19 C and D shall have the same actuarial present value, computed
20 as of the effective date of the pension, as the amount of
21 pension under form of payment A.

22 C. A retired member who is being paid a pension
23 under form of payment B or C with the member's spouse as the
24 designated survivor pension beneficiary may, upon becoming
25 divorced from the named spouse and subject to an order of a

1 court as provided for in Section 10-11-136 NMSA 1978, elect to
2 have future payments made under form of payment A.

3 D. A retired member who is being paid a pension
4 under form of payment B or C with a designated survivor pension
5 beneficiary other than the retired member's spouse or former
6 spouse may exercise a one-time irrevocable option to deselect
7 the designated beneficiary and elect to:

8 (1) designate another survivor pension
9 beneficiary, provided that:

10 (a) the retired member shall not have an
11 option to change from the current form of payment; and

12 (b) the amount of the pension under the
13 form of payment shall be recalculated and shall have the same
14 actuarial present value, computed as of the effective date of
15 the designation, as the amount of pension under form of payment
16 A; or

17 (2) have future payments made under form of
18 payment A."